IN THE

Supreme Court of the United States

October Term, ___

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,

Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO,

Appellees.

On Appeal From The Supreme Court of New Mexico

JURISDICTIONAL STATEMENT

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v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO,

Appellees.[1]

On Appeal From The Supreme Court Of New Mexico

JURISDICTIONAL STATEMENT

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[1] Appellees in the New Mexico Supreme Court, in addition to the State of New Mexico, were the Bureau of Revenue and its Commissioner, Mr. Fred O'Cheskey. By New Mexico Laws 1977, Chapter 249 (effective March 31, 1978), the Bureau of Revenue was abolished and the Electrical Energy Tax Act was amended to define "Bureau" as the Revenue Division of the Taxation and Revenue Department. The Revenue Division and its Director, Mr. Arthur B. Snead, have succeeded to the functions of the Bureau of Revenue and Mr. O'Cheskey, respectively, and have been substituted as parties here, pursuant to Rule 48(3), Rules of the Supreme Court.

Arizona Public Service Company, El Paso Electric Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, and Tucson Gas & Electric Company hereby appeal from the opinion and judgment of the Supreme Court of the State of New Mexico, entered on March 23, 1978, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The Memorandum Opinion of the District Court of the First Judicial District, Santa Fe County, New Mexico, is not reported and appears herein as Appendix A. The Opinion of the Supreme Court of New Mexico is reported at ___ N.M. ___, 576 P.2d 291, and appears herein as Appendix B. No other written opinions have been delivered.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is an action commenced by appellants in the District Court of the First Judicial District, Santa Fe County, New Mexico, seeking a judgment declaring the provisions of New Mexico's Electrical Energy Tax Act, Chapter 263, Laws 1975 (Appendix D) to be unconstitutional and void by reason of the provisions of Article I, Section 8, cl. 3, Article I, Section 10, Article IV, Section 2, cl. 1, and Amendment XIV of the Constitution of the United States, and by reason of the

provisions of Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. §391. The decision of the Supreme Court of New Mexico (Appendix B) was in favor of the validity of the Electrical Energy Tax Act.

(ii) The judgment or decree sought to be reviewed is the Opinion of the Supreme Court of New Mexico (Appendix B) sustaining the Electrical Energy Tax Act. That Opinion was issued and filed on March 23, 1978. No petition for rehearing was submitted. The Notice of Appeal (Appendix C) was filed in the Supreme Court of New Mexico on April 12, 1978.

(iii) Jurisdiction of the appeal is conferred by Title 28, United States Code, Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are:

American Oil Co. v. Neill, 380 U.S. 451 (1965)

Austin v. New Hampshire, 420 U.S. 656 (1975)

Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318 (1977)

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963)

Heublein, Inc. v. So. Carolina Tax Comm'n, 409 U.S. 275 (1972)

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954)

(v) The validity of the New Mexico Electrical Energy Tax Act, Chapter 263, Laws 1975 is here involved. The pertinent provisions of that Act have been codified at Sections 72-34-1 through 72-34-6, NMSA 1953 (1975 P.S.) and Section 72-16A-16.1, NMSA 1953 (1975 P.S.). The full text of that Act is set forth in

Appendix D. The full text of Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. §391 is as follows:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Is the New Mexico Electrical Energy Tax Act, which applies only to electricity generated in New Mexico and transmitted to other states for sale and consumption, discriminatory within the meaning of §2121(a) of the Tax Reform Act of 1976, and consequently null and void by reason of the Supremacy Clause?

2. May a state, consistently with the limitations imposed by the Commerce Clause, impose a tax which applies only to electricity generated within that state and transmitted to other states for sale and consumption?

3. Does a state tax, the clear purpose and effect of which is to collect revenue solely from citizens of other states, violate the Commerce Clause and the Due Process Clause of the Fourteenth Amendment?

4. Is it a violation of the Import-Export Clause for a state to impose a tax whose economic incidence is on electricity transmitted for sale and consumption in a foreign nation?

STATEMENT OF THE CASE

Appellants Arizona Public Service Company (hereinafter "APS"), El Paso Electric Company (hereinafter "EPE"), Salt River Project Agricultural Improvement and Power District (hereinafter "SRP"), Southern California Edison Company (hereinafter "SCE"), and Tucson Gas & Electric Company (hereinafter "TGE") are public utility companies whose service areas encompass the major population centers of El Paso, Texas; Tucson and Phoenix, Arizona; and Southern California (excluding the City of Los Angeles); and their environs. EPE also provides retail electric service in an area in south central New Mexico, and is the only appellant regulated as a public utility by the State of New Mexico.

Portions of the electricity required to satisfy the demand for energy in these areas, which include an aggregate population in excess of 10 million people, is produced by appellants at generation facilities located within the boundaries of the State of New Mexico. Electricity generated at these New Mexico facilities is first delivered, through a switchyard, to transformers which increase its voltage to a level required for transmission. This high voltage energy is then allocated by switchyard facilities to transmission lines which carry it to the particular service area where it is destined to be consumed. Until generated energy is transformed and allocated in this fashion, the particular market in which it will be distributed cannot be identified. The transmission systems of appellants are interconnected

with each other and with the systems of other electric utilities and the United States Bureau of Reclamation, thereby forming an interstate grid encompassing the entire western United States and portions of Canada and Mexico.

Certain amounts of the energy generated by appellants at their New Mexico facilities is initially sold, at the wholesale level, to other utilities for subsequent resale. Appellants have engaged in such wholesale transactions both with each other and with other utilities, including Public Service Company of New Mexico. The balance of this energy generated in New Mexico by appellants is sold at the retail level, for immediate consumption. The vast majority of these sales are made after the electricity has been transmitted, for consumption in the appellants' service areas in other states.[2]

The New Mexico Electrical Energy Tax Act (hereinafter "the Energy Tax" or "the Act") became effective on July 1, 1975. (The full text of the Act is set forth in Appendix D). Section 3(A) of the Act, §72-34-3.A, NMSA 1953 (1975 P.S.), purports to impose upon "the privilege of generating electricity in this state for the purpose of sale," a tax of four-tenths of one mill for each net kilowatt hour of electricity generated in New Mexico. The levy's apparent effect is blunted, however, by the "credit" provisions contained in Section 9, §72-16A-16.1, NMSA 1953 (1975 P.S.). Thus, Section 9(B) permits the generator to take a

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[2] APS has made some minor retail sales of electricity in New Mexico, and EPE engages in retail sales of power in that portion of its service area which is located in southern New Mexico.

credit, against the New Mexico Gross Receipts Tax, §72-16A-1, *et seq.*, NMSA, in the amount of any Electrical Energy Tax paid with respect to electricity *generated and consumed in New Mexico.*[3] No similar credit is available for electricity generated in New Mexico but consumed in other states.

Much of the electricity generated in New Mexico, both by plaintiffs and others, is initially sold in a wholesale transaction for resale at the retail level. The New Mexico Gross Receipts Tax does not apply to such wholesale transactions. Under ordinary circumstances, accordingly, a generator-wholesaler would not be in a position to invoke the credit provisions of Section 9(B), for that generator would incur no gross receipts tax liability against which to credit the amount of Energy Tax imposed. Section 9(C) provides a pointedly limited accommodation for this situation. Under Section 9(C), the wholesale seller is required to assign, to the person marketing the electricity *for consumption in New Mexico,* any applicable credit available under Sections 9(A) and (B). The retailer-assignee is in turn required to reimburse the wholesaler-assignee in an amount equal to the credit against the Gross Receipts Tax received by the retailer. This credit assignment-reimbursement device insures that the generator-wholesaler, who would not ordinarily be subject to the Gross Receipts Tax and would ordinarily receive no benefit from the Section 9(B) credit, will incur no greater tax liability for locally consumed en-

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[3] This Court has previously described the operation of these credit provisions. *See Arizona v. New Mexico,* 425 U.S. 794, 795 (1976).

ergy. Again, Section 9(C) is wholly inapplicable if the wholesaled energy is resold for consumption in another state.

Throughout the course of this litigation, it has been undisputed that, because of the credit provisions of Sections 9(B) and (C), the Energy Tax will impose no additional tax liability upon electricity which is generated and consumed in New Mexico. To the contrary, to the extent the Energy Tax produces any additional revenue for the State of New Mexico, such revenues will derive entirely from electricity which is generated in New Mexico, and transmitted to and consumed in other states.[4]

Shortly after the enactment of the Act, the State of Arizona sought to invoke this Court's original jurisdiction in order to challenge the constitutional validity of the Energy Tax. This Court noted the pendency of this litigation in the courts of New Mexico, and declined to exercise original jurisdiction, observing:

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[4] Subsequent to the filing of the action, each appellant submitted to the Bureau of Revenue a return which showed the following amounts of electricity generated by each in New Mexico in July, 1975, and the amount of Energy Tax applicable to that generation which would not be expunged by the Act's credit provisions:

Appellant	Amount of Generation (KWH)	Amount of Tax
APS	417,874,000	$167,149.60
EPE	94,720,752	37,806.70
SRP	48,145,000	19,258.00
SCE	231,003,000	92,401.20
TGE	145,206,000	58,082.40

> If on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal under 28 U.S.C. §1257(2). *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976).

This action was commenced in the District Court of Santa Fe County on September 18, 1975, with the filing of a Complaint seeking a declaratory judgment that the Act was void and unconstitutional by reason of the provisions of Article I, Section 8, cl. 3, Article I, Section 10, Article IV, Section 2, cl. 1 of the Constitution of the United States, and of the due process and equal protection clauses of Amendment XIV to that Constitution. An initial Motion for Summary Judgment was filed by appellants on September 15, 1976.

Subsequent to the passage of the Tax Reform Act of 1976, appellants filed an Amended Complaint, alleging the Act to be void and unconstitutional by reason of the provisions of Article VI, cl. 2 of the Constitution. A Supplemental Motion for Summary Judgment was thereafter submitted. Appellees responded with a similar Motion for Summary Judgment and the matter was heard by the District Court in due course. Following the issuance of its Memorandum Opinion (Exhibit A), the District Court entered Judgment, on February 18, 1977, denying appellants' Motion for Summary Judgment and Supplemental Motion for Summary Judgment, and granting appellees' Motion for Summary Judgment.

An appeal was duly taken to the Supreme Court of New Mexico. On March 23, 1978, the New Mexico Supreme Court issued its Opinion (Appendix B), affirming the judgment of the District Court and sustaining the validity of the Energy Tax. A Notice of Appeal to this Court was filed with the New Mexico Supreme Court on April 12, 1978. (Appendix C).

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal presents the question whether the State of New Mexico may constitutionally impose a form of "domestic export tax" which applies *only* to goods (here, electricity) produced within the State which are transported to other states for sale and consumption. Perhaps more significantly, the New Mexico Supreme Court has sustained the Energy Tax, and New Mexico's authority to enact it, in the face of an explicit Congressional prohibition against its imposition. Plenary consideration by this Court is required both to prevent frustration of the expressed will of Congress and to repudiate a principle which undermines the acknowledged purpose of the Commerce Clause:

1. This Court has consistently recognized that Article I, Section 8, cl. 3 of the Constitution (the "Commerce Clause") vests Congress with virtually plenary regulatory authority in matters affecting interstate commerce, *cf., e.g., Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964), including the power to define the permissible and the impermissible in state taxation of interstate businesses. *Cf.*, 15 U.S.C. §381; *Heublein, Inc. v. So. Carolina Tax Comm'n*, 409 U.S. 275 (1972). Once Congress has spoken, the Supremacy

Clause (Article IV, cl. 2 of the Constitution) requires the invalidation of any conflicting state enactment. *Cf., City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973); *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945).

Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. §391, forbids the imposition by a state of any tax "on or with respect to the generation of electricity" which is "discriminatory". A "discriminatory" tax is defined by and for the purposes of that statute as one which "results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce" than on locally-consumed energy. The Energy Tax falls quite clearly within the scope of that definition.

It cannot be disputed that the Energy Tax is one "on or with respect to the generation of electricity. . . ." The discriminatory burden of the Energy Tax is equally apparent. As this Court observed in *Arizona v. New Mexico, supra:*

> The tax is nondiscriminatory on its face: it taxes all generation regardless of what is done with the electricity after generation. However, the 1975 Act provides a credit against gross receipts tax liability in the amount of the electrical energy tax paid for electricity consumed in New Mexico .... The State of New Mexico concedes that the Arizona utilities will not be able to take advantage of the credit because their sales of electrical energy are outside the State .... 425 U.S. at 794-95.

Under the "credit" provisions of Section 9 of the Act, the tax imposed by Section 3 will *never* be paid with respect to energy consumed in New Mexico.[5] Section 9(B) wholly expunges any electrical energy tax which would be imposed upon electricity consumed in New Mexico, by allowing it to be credited against New Mexico's Gross Receipts Tax (§§72-16A-1 *et seq.*). This credit arises *only* when the electricity is sold at retail for consumption in New Mexico. No similar credit is provided for electricity generated in New Mexico but consumed in other markets. Section 9(C) of the Act insures that the discrimination is complete. A wholesaler of electricity generated in New Mexico incurs no gross receipts tax liability against which the amount of Energy Tax due could be applied. The assigned credit and reimbursement device created by Section 9(C) will directly abate any electrical energy tax imposed on energy sold at wholesale for local consumption, leaving the burden of the tax to fall entirely upon utilities such as appellants who sell at wholesale for consumption outside New Mexico.

The net effect of this statutory scheme is obvious. Electricity generated and ultimately consumed in New Mexico is not subject to the economic burdens of the Energy Tax, while electricity transmitted for consumption in other states is taxed. The Energy Tax clearly and undeniably imposes a "greater tax burden on electricity ... generated and transmitted in interstate

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[5] Regulations issued by the New Mexico Commissioner of Revenue expressly recognize that the tax is immediately offset by a "potential" credit. The text of G. R. Regulations 16.1:1 is set forth in Appendix E.

commerce" within the meaning of the Tax Reform Act.

The language of the Tax Reform Act is clear and unambiguous. Section 2121(a) speaks of *"a tax* on or with respect to the generation or transmission of electricity," not *all taxes* or the *total tax structure.* Congress enacted a statute which, by its terms, invalidates any single state tax which is in fact discriminatory. There is no exculpation based upon other aspects of the state's tax structure. Nor is there any basis, either in the language of the Tax Reform Act or its legislative history, for the New Mexico Supreme Court's implicit assumption that Congress was merely engaged in the essentially unnecessary exercise of reconfirming doctrine enunciated by this Court in prior decisions. Indeed, the legislative history makes quite clear the intent of Congress to specifically reach and proscribe the Energy Tax.

The provision that was to become §2121 was added by the Senate Finance Committee to the version of the Tax Reform Act passed by the House of Representatives (H.R. 10612). In its explanation of this addition, the Report of the Finance Committee clearly describes the Energy Tax as an example of the type of state taxation to be forbidden:

Reasons for change

> The committee has learned that one State places a discriminatory tax upon the production of electricity within its boundaries for consumption outside its boundaries. While the rate of the tax itself is identical for electricity that is ultimately consumed outside the State and electricity which is consumed inside the State, discrimination re-

sults because the State allows the amount of the tax to be credited against its gross receipts tax if the electricity is consumed within its boundaries. This credit normally benefits only domiciliaries of the taxing State since no credit is allowed for electricity produced within the State and consumed outside the State. As a result, the cost of the electricity to nondomiciliaries is normally increased by the cost the producer of the electricity must bear in paying the tax. However, the cost to domiciliaries of the taxing State does not include the amount of the tax.

The committee believes that this is an example of discriminatory State taxation which is properly within the ability of Congress to prohibit through its power to regulate interstate commerce. S. Rep. No. 94-938-Part I, 94 Cong., 2d Sess. (1976) 437-38 (footnotes omitted), as reported in 1976 U.S. Code Cong. & Admin. News, 3865-66.

Almost immediately following the report of the Finance Committee bill to the Senate, Senator Domenici of New Mexico proposed an amendment to strike this new section in its entirety. During the course of floor debate on this "Domenici Amendment", it was made quite clear that the section, if retained, would invalidate the Energy Tax. *See*, 122 Cong. Rec. S. 12712 *et seq.* (daily ed. July 28, 1976). The proposed "Domenici Amendment" was soundly defeated, and the Senate enacted the provision without change.

The Conference Committee which considered and resolved the differences between the Senate and House versions of H.R. 10612 incorporated the section on discriminatory taxation, but changed the words "higher gross or net tax" to "greater tax burden" without further explanation. The Conference Report expressly

states that it is adopting the Senate amendment to H.R. 10612. H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. (1976) 503, as reported in 1976 U.S. Code Cong. & Admin. News 4206; S. Conf. Rep. No. 94-1236, 94th Cong., 2d Sess. (1976) 503. The Conference version was passed by both the House and Senate without further alteration, and signed into law on October 4, 1976.

The construction accorded §2121(a) by the New Mexico Supreme Court disregards this legislative history and renders it essentially meaningless. That Court's contrived reading of the statute leads to the anomalous and improper result of rendering a Congressional statute inapplicable to the very situation which precipitated its passage. This Court has consistently held that such a result is to be avoided:

> Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law. *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938).

The clear and unambiguous wording of 15 U.S.C. §391 encompasses the New Mexico Electrical Energy Tax Act and prohibits its assessment. The statutes's legislative history makes it abundantly clear that it was intended to achieve that result. The New Mexico Supreme Court has effectively re-worded a Congressional enactment in a fashion that disregards Congressional intent, in order to save the Energy Tax. This is a particularly compelling setting for the exercise of this Court's jurisdiction.

2. Although it is literally a grant of legislative power to the United States Congress, it is now established that the Commerce Clause, (Article I, Section 8, cl. 3 of the Constitution) of its own force, acts as a restriction upon the taxing powers of the states, even where Congress has not spoken. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977). Perhaps the principal limitation imposed by the provisions of the Commerce Clause, as interpreted by this Court, is that a state may neither regulate nor tax in a fashion that discriminates against interstate commerce. *Cf., Boston Stock Exchange v. State Tax Comm'n, supra*; *Northwestern States Portland Cement Co. V. Minnesota*, 358 U.S. 450, 458 (1959); *Best & Co. v. Maxwell*, 311 U.S. 454, 457 (1940). "The conclusion is inescapable: *equal treatment for in-state and out-of-state taxpayers similarly situated* is the condition precedent" for a valid state tax on interstate transactions. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69-70 (1962) (emphasis added).

The discriminatory nature of the Energy Tax is no more apparent than when one views its impact upon wholesale transactions. Prior to enactment of the Energy Tax, wholesale transactions of both interstate and local utilities were treated in equivalent fashion under the New Mexico Gross Receipts Tax—neither transaction was subject to its provisions. Under the Energy Tax, if a utility generating electricity in New Mexico sells that electricity at the wholesale level to an entity that transmits it to another state for consumption, no credit arises and the Energy Tax must be paid. If, on the other hand, that electricity is wholesaled to a distributor or retailer who markets it for consumption in

New Mexico, no Energy Tax will be paid, by operation of the provisions of Sections 9(B) and (C). The effect of Section 9(C) is to substitute a private rebate for a tax credit which entirely relieves a company generating and wholesaling power for consumption in New Mexico from any additional tax liability.[6]

There are other more subtle forms of discrimination involved as well. Because they transmit a greater portion of the electricity they generate in New Mexico for consumption in other markets than do local utilities, appellants will incur a far greater tax liability under the Energy Tax and will be placed at a competitive disadvantage in the wholesale market where they do compete with New Mexico-based utilities. A similar consequence can be anticipated at the retail level for EPE, which competes directly with local New Mexico utilities in uncertified areas in southern New Mexico. It is clearly impermissible for a state to levy a tax which discriminates against interstate commerce "by providing a direct commercial advantage to local busi-

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[6] The statutory terminology is somewhat fictionalized. If the tax statutes of New Mexico are straightforwardly applied, the wholesaler of electricity incurs no Gross Receipts Tax liability, and has nothing against which to apply its Section 9(B) credit. Strictly speaking, then, the wholesaler has no "credit" to assign to its retailer customer under Section 9(C). To deal with this problem, regulations issued by the Bureau of Revenue refer to the wholesaler as acquiring a "potential credit" which is assigned and becomes an actual credit if the energy is in fact resold to New Mexico consumers (Appendix E). Quite obviously, the Act itself refers to no such "potential credit" concept.

ness . . . ." *Northwestern States Portland Cement Co. v. Minnesota, supra*, 358 U.S. at 458.

The discrimination of the Energy Tax against wholesale sales of power for eventual consumption in other states, however, is explicit. In *Halliburton Oil Well Cementing Co. v. Reily, supra*, this Court considered the application of a Louisiana use tax to specialized oil well servicing equipment which was manufactured and assembled by the taxpayers in other States for use in Louisiana. In valuing this equipment for use tax purposes, Louisiana employed a method of computation that placed the taxpayers on the same footing as local companies who purchased the equipment at retail in Louisiana, but not with local entities who had purchased and assembled the equipment themselves. The Court enunicated the rule of "equal treatment for in-state and out-of-state taxpayers", 373 U.S. at 70, and held that Louisiana had used an invalid basis for comparison in applying it. As Halliburton was a "manufacturer-user", it had to be treated as would a local "manufacturer-user" rather than a local purchaser. In the present case, the appellants, interstate wholesalers, must be compared with local wholesalers and, when they are, the equality of treatment mandated by *Halliburton* is indisputably absent.

The Opinion of the New Mexico Supreme Court simply ignores the undeniably discriminatory impact of the Energy Tax on wholesale transactions. That Court's observation that: "All producers *who retail their electricity* in New Mexico can take advantage of the credits provided in §9", 576 P.2d at 295 (emphasis added), both makes and misses the point. The point

missed is that the most invidious and direct discrimination of the Energy Tax occurs at the *wholesale* level. The point made is that the benefits of the credit provisions, which wholly expunge Energy Tax liability, are extended *only* to those whose transactions are localized within the State, leaving the entire burden of the Act to fall upon those engaged in interstate commerce.

The pretense that New Mexico has simply reduced its gross receipts tax on the retail sale of electricity to 2%, while taxing all generation at 2%, is just that. The Energy Tax cannot be saved by rewriting it as a hypothetical alternative tax which may or may not survive constitutional scrutiny. The tax which New Mexico actually seeks to impose falls only upon interstate transactions, and that type of discrimination merits plenary consideration and disavowal by this Court.

3. A separate source of constitutional concern where State taxation is applied to transactions in interstate commerce is "the danger that such taxes can impose cumulative burdens upon interstate transactions which are not presented to local commerce." *Gen'l. Motors Corp. v. Washington*, 377 U.S. 436, 440 (1964). *Cf. also, Standard Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560 (1975); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Where that danger becomes a reality, as here, the tax on the interstate transaction is unconstitutional.

The Energy Tax indisputably places an economic burden upon electricity generated within the State of New Mexico, and that burden will be borne by that electricity until it reaches its point of initial consumption. Because of the credit provisions of the Act, its economic burden falls solely upon electricity transmit-

ted for consumption in other states. In the District Court, appellants demonstrated that the same electricity which bears the exclusive burden of the Energy Tax becomes subject to additional taxation when it reaches the state where it is to be consumed. In 1975 alone, appellants paid over $13,000,000 in taxes, attributable to electricity generated in New Mexico, to state and local jurisdicitons where that electricity was consumed.

The New Mexico Supreme Court again avoids this issue of multiple taxation by characterizing the Energy Tax as one on the generation of electricity, which, it reasons, only occurs in New Mexico and can only be taxed by New Mexico. 576 P.2d at 296. The Court's principal reliance for this conclusion is on *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932), in which this Court held that generation of electricity was a local activity separable from its subsequent interstate transmission. The result in *Pfost* is consistent with decisions of this Court concerning severance or production taxes in other economic areas. *Cf., Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927) (natural gas production); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923) (iron ore extraction); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922) (anthracite coal extraction); *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919) (manufactured goods).

Pfost and its antecedents establish only that a state production tax uniformly applied does not offend the Commerce Clause. In none of these "production tax" cases, however, was there any contention that the levy discriminated against interstate commerce. No prior decision has upheld, under the Commerce Clause, a

production tax which applied only to goods shipped for consumption outside the taxing state; yet that is the essential feature of the tax New Mexico has imposed on electricity produced within its borders.

Perhaps more significantly, the Energy Tax is simply not, in its practical operation, a production or severance tax. By its very terms, the Energy Tax is imposed not upon the generation of power, but upon "the *privilege* of generating electricity in this state *for the purpose of sale*." §72-34-3, NMSA 1953 (1975 P.S.) (emphasis added). Moreover, the economic impact of the Energy Tax does not fall upon all generation of electricity for sale. Under the Act's "credit provisions", no tax liability will accrue if electricity generated in New Mexico is sold for consumption in New Mexico.

At the point of generation, it cannot be ascertained, with any degree of certainty, whether any Energy Tax liability will attach or the amount of tax that will have to be paid. To the contrary, because of the "potential credit" recognized by the Bureau of Revenue's own regulations, neither liability for nor the amount of the Energy Tax can be ascertained until it is determined where the generated electricity will be transmitted and consumed. The practical opeation of the Act's credit provisions delays the incidence of the Energy Tax beyond the point of production to the point of sale and consumption.

The Act is closely analogous to the Texas tax on the occupation of "gathering gas" which this Court invalidated in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). That tax was measured by the volume of gas "taken", and its incidence was

held to be "on the exit of gas from the State"—a point beyond the step where production had ceased and transmission in interstate commerce had begun. The constitutional infirmity was that every state through which the line passed could impose a similar levy and "resurrect the customs barriers which the Commerce Clause was designed to eliminate." 347 U.S. at 170.

The Energy Tax carries the vice perceived in *Michigan-Wisconsin* at least one impermissible step further. In *Michigan-Wisconsin*, the tax in question purported to apply equally to gas which moved both in intrastate and interstate commerce. The Energy Tax does not make that pretense. Here, it is *only* interstate transmission and consumption of electricity that incurs any monetary liability by reason of the Energy Tax. Moreover, while the Texas tax was invalidated because it would "permit a multiple burden" upon interstate commerce, 347 U.S. at 170, here multiple state taxation of the electricity in question is not potential but real.

4. In a variety of analogous contexts, this Court has suggested that both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment independently impose a geographic limitation upon the permissible exercise of the taxing power of a state. Thus, in applying an *ad valorem* property tax to the rolling stock of an interstate railroad, a state must employ a formula that fairly estimates the amount of such property with a taxable *situs* within the state, because:

> In tapping these common sources of revenue a state cannot, we have held, use a fiscal formula, whatever may be its appearance of certitude, to project the taxing power of the state plainly beyond its borders. *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362, 365 (1940).

The Due Process Clause of the Fourteenth Amendment has been found to impose a similar restriction. *Norfolk & Western Railway v. Missouri State Tax Comm'n*, 390 U.S. 317, 325 (1968). Nor has the rule been confined in its application to state property taxes. *Evco v. Jones*, 409 U.S. 91 (1972) found the application of a New Mexico sales tax to a transaction concluded in another state "an impermissible burden on commerce." 409 U.S. at 93. *Cf., American Oil Co. v. Neill*, 380 U.S. 451 (1965); *Conn. Gen'l Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938).

The economic burden of the Energy Tax falls solely and exclusively upon electricity generated in New Mexico but consumed elsewhere, while sparing locally consumed electricity from any additional tax burden. This disparate impact is neither inadvertent nor fortuitous. The legislative history makes clear that the Energy Tax was conceived, designed and principally defended as a measure that would collect revenues solely from the residents of other states, and was carefully tailored to avoid placing any tax burden whatsoever on the residents of New Mexico.

The Act originated as S.B. 258, introduced and cosponsored by Senator Aubrey Dunn, which imposed a tax on generation of electricity at the rate of one-half mill ($.0005) per kilowatt hour. The Bureau of Reve-

nue Bill Review Report on the measure described the impact of the proposed tax and indicated that, while the tax would increase electricity bills for consumers in other states, it would produce no such increase in charges within New Mexico.

The first hearings were held by the Corporations Committee of the New Mexico Senate, at which time Senator Dunn introduced a Senate Corporations Committee Substitute for Senate Bill 258, which added, *inter alia,* what is now Section 9(C) of the Act. At this hearing, the Commissioner of the Bureau of Revenue assured the Committee that: "[T]he taxpayer in California or the consumer in California would bear the brunt of the tax."

The bill was next considered by the Senate Finance Committee on March 5, where Senator Dunn again stated that "... there will be very little possibility of any of this being passed on to the New Mexico consumer." It was discovered at that hearing, however, that, in the case of at least one New Mexico utility, application of the credit provisions would leave some net Energy Tax liability, which might be passed on to New Mexico residents.

This problem was cured by a Senate Finance Committee Substitute bill, which reduced the tax rate to four-tenths of a mill ($.0004) per kilowatt hour. Materials in the record establish that the rate of tax was reduced to accommodate the one situation where the credit provisions would not wholly abate Energy Tax

liability for a local utility. This Senate Finance Committee Substitute was then debated in the Senate, where Senator Dunn again explained:

> [A]nd the idea behind it, Mr. President, is that we levy this generating tax and we allow the generating companies to take credit for the gross receipts tax which they collect on this power as they sell it, against this particular amount of generation tax. When this is done, Mr. President, it forms a washout which allows that most of the tax could be passed on in almost 99.9 per cent of the time to the residents of Arizona and California.

The legislative history in the New Mexico House of Representatives, which considered the Energy Tax after its passage by the Senate, is of identical import. Appearing before the House Taxation and Revenue Committee, Senator Dunn stressed that under the Act: "there would be hardly any taxation on the individual consumer in the State of New Mexico", and that "this particular tax was for the consumer, Mr. Chairman, for the consumer in Arizona and for the consumer in California."

During the debate in the House of Representatives, the measure was sponsored by Representative Lopez, who had opposed prior attempts to impose generation taxes. Representative Lopez explained his change of heart to his colleagues in the following fashion:

> But my opposition was based on the fact that there was no way to impose the tax without placing a burden on the New Mexico taxpayer or utility user. However, this year a device has been worked out whereby there is a credit in it and the tax will be paid by out-of-state residents with no additional burden on our New Mexico residents.

So, for that reason I stand before you today supporting this bill and carrying it.

This brief description of its legislative history demonstrates that the Energy Tax was conceived and designed for the explicit purpose of deriving tax revenues from residents of other states. In every instance where the possibility was discovered that some portion of the tax burden might fall on New Mexico residents, the bill was rapidly amended to avert it. Initially, Section 9(C) was added to accommodate the local wholesaler who could not take full advantage of the Section 9(B) credit. When it was nevertheless discovered that there was one local utility that might suffer some net Energy Tax liability, the rate of tax was reduced to avoid that result. New Mexico has never seriously disputed that the Act does serve its intended purpose—it imposes a greater tax burden *only* upon electricity transmitted to and consumed in other markets.

In *Austin v. New Hampshire*, 420 U.S. 656 (1975), this Court struck down a New Hampshire "commuter income tax" because: "In effect, then, the State taxes only the income of nonresidents working in New Hampshire," 420 U.S. at 659. While *Austin* was based upon the Privileges and Immunities Clause of Article IV, Section 2, cl. 1, of the Constitution, that clause was viewed as one designed to preserve "the structural balance essential to the concept of federalism." 420 U.S. at 662. The Commerce and Due Process Clauses serve precisely the same concern. The Energy Tax is at least

as serious a manifestation of the states' "centrifugal tendency," 420 U.S. at 660, as was the New Hampshire "commuter tax," and equally deserving of repudiation.

The considerations underlying enactment of the Energy tax are perhaps understandable, but nonetheless constitutionally impermissible. It is not at all surprising that a taxing body should seek to shift the burden of its revenue collections to non-constituents. Similarly, the desire of a state to capitalize upon, or preserve, natural resources located within its borders by natural accident is not a novel phenomenon. *Baldwin v. Seelig*, 294 U.S. 511 (1935); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). It has always been this Court's special function to confine these parochial tendencies to the bounds required by our Federal system. Those bounds are clearly exceeded by the Energy Tax.

5. While the limitations imposed by the Commerce Clause upon the states' taxing power are qualified in nature, that is not the case under the Import-Export Clause (Article I, Section 10). "By its own terms, the prohibition on taxation contained in the Import-Export Clause is absolute . . . ." *Kosydar v. Nat'l Cash Register Co.*, 417 U.S. 62, 65 (1974). *Cf., also, Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946). This Court has recently held that the Import-Export Clause is not offended by a nondiscriminatory *ad valorem* state property tax on imported inventories, *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), nor by a state business and occupation tax as applied to stevedoring. *Dep't of Revenue v. Assoc. of Wash. Stevedoring Companies*, ___ U.S. ___, 46 USLW 4363 (April 26, 1978). In both these decisions,

this Court declined to address the propriety of a state tax on goods in transit to a foreign country.

That is precisely the issue presented here. Some of the appellant utilities generate electricity in New Mexico for sale and consumption in the Republic of Mexico. As noted earlier, the statutory incidence of the Energy Tax is on the generation of electricity *for sale*, and its actual economic incidence is governed by its point of eventual consumption. In either event, New Mexico has delayed the imposition of its Energy Tax to a point beyond where production has ceased and the process of interstate transmission has begun. With respect to the electricity transmitted to and consumed in Mexico, the Energy Tax is in a very real sense imposed upon a good in transit to that foreign nation. This Court has specifically reserved judgment on the propriety of such a tax under the Import-Export Clause, and should address the question here.

CONCLUSION

The remarks of Senator Fannin, speaking on the Senate floor in opposition to the "Domenici Amendment" described earlier, eloquently describe the fundamental importance of the questions presented by this appeal:

> Mr. President, we are not talking about only Arizona and New Mexico. We are talking about what could happen all over the United States. We are talking about a potential taxing war on the sale of power which could be devastating. 122 Cong. Rec. S12713 (daily ed. July 28, 1976).

Senator Fannin's observations have proved prophetic. West Virginia has recently amended its tax code to impose a levy on exported electricity, W. Va. Code §11-13-2m, and Pennsylvania has enacted a gross receipts tax on "sales of electric energy produced in Pennsylvania and made outside of Pennsylvania."[7] Power has become a precious commodity, and the temptation to collect revenue from its production without burdening the residents of the taxing jurisdiction is compelling. This Court should reiterate and clarify the governing constitutional principles at the incipiency of this movement.

The Congressional response to this potential national problem was prompt and explicit — condemnation of New Mexico's Energy Tax and prohibition of the enactment of similar state taxing measures in the future. That Congressional response has been effectively nullified by the decision to be reviewed. In the process, the New Mexico Supreme Court has sustained the principle that a state may validly impose an excise upon the exit from its borders, for sale and consumption in other states, of products locally produced. That principle is at once unprecedented and contrary to the consistent teachings of this Court concerning the purposes served by the Commerce Clause. The federal questions presented are

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[7] The full text of the pertinent portions of the statutes enacted by West Virginia and Pennsylvania are set forth in Appendices F and G, respectively.

substantial and important, and this Court should grant them plenary consideration.

Respectfully submitted,

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Attorneys for Appellants

By _____
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IN THE

Supreme Court of the United States

OCTOBER TERM, __

No. __

ARIZONA PUBLIC SERVICE COMPANY, et al.,

Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, et al.,

Appellees.

CERTIFICATE OF SERVICE BY MAIL

Daniel J. McAuliffe, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is an attorney for Appellants herein, Arizona Public Service Company, El Paso Electric Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, and Tucson Gas & Electric Company.

2. That the Jurisdictional Statement submitted herewith has been served upon counsel, in accordance with the provisions of Rule 33 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage prepaid, prop-

erly addressed, this 20th day of June, 1978, to:

Toney Anaya
Attorney General of New Mexico
P. O. Box 1508
Santa Fe, New Mexico 87503

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3. That the foregoing represents service on all parties required to be served under the provisions of rule 33, Rules of the United States Supreme Court.

/s/ DANIEL J. MCAULIFFE
Daniel J. McAuliffe

APPENDIX A

State of New Mexico **County of Santa Fe**

IN THE DISTRICT COURT

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY AND TUCSON GAS & ELECTRIC COMPANY,
Plaintiffs,

vs.

FRED O'CHESKEY, Commissioner of Revenue, Bureau of Revenue, and STATE OF NEW MEXICO,
Defendants.

No. 50245

MEMORANDUM OPINION

This is a suit for a declaratory judgment and injunction whereby plaintiffs seek to have the Court declare and adjudicate as unconstitutional and void the New Mexico Electrical Energy Tax Act, Chapter 263, Laws 1975 (Sections 72-34-1 to 72-34-6, NMSA 1953). The suit further seeks to enjoin the enforcement of that act.

We decide these legal and equitable issues in favor of the defendants.

The operable provisions of the Electrical Energy Tax Act material to the issues in this case are as follows:

"Section 72-34-3. Imposition of tax — Rate — Denomination as electrical energy tax. — A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill. ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

B. The tax imposed by this section shall be referred to as the 'electrical energy tax.'

Section 72-34-6. Relief from other taxes. — Unless otherwise specified by statute the imposition of the electrical energy tax shall not act to relieve any person or activity from any other tax levied by the State of New Mexico or its political subdivisions."

At the same session of the New Mexico Legislature, and apparently in conjunction with the passage of the Electrical Energy Tax Act, the Legislature amended the Gross receipts tax law by enacting Chapter 263, Section 9, Laws 1975 (Section 72-16A-16.1, NMSA, 1953), which states:

"Credit — Gross receipts tax. — A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivision thereof, the amount of such tax paid may

be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

C. The credit under subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit."

In their complaint plaintiffs allege that the Electrical Energy Tax Act is unconstitutional in that:

(1) It violates the commerce clause of Article I, Section 8 of the United States Constitution by discriminating against and imposing burdens upon each plaintiff's interstate commerce in the transmission and sale of electricity;

(2) It denies unto plaintiffs equal protection of the law contrary to Section 1 of the Fourteenth Amendment to the United States Constitution, and of Article II, Section 18 and Article IV, Section 26 of the New Mexico Constitution;

(3) It deprives plaintiffs of property without due process of law in violation of Article II, Section 18 of the New Mexico Constitution;

(4) It violates Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the United States Constitution.

After the complaint was filed and during the pendency of this case, the United States Congress passed what was named and referred to as the "Tax Reform Act of 1976." Section 1322, Title II, Section 201(a) of that act contains all the provisions thereof that are here applicable and is quoted:

"No state, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

Since the passage of the Tax Reform Act of 1976, plaintiffs have added to their claim that the New Mexico Electrical Energy Tax Act is void and invalid, in that it now violates Federal law.

It is only the gross receipts tax credit provisions found in Section 72-16A-16.1, NMSA, 1953, supra which may be said to set up in this case a justicable controversy, and which give birth to the claims of the plaintiffs. Absent such credit provisions, we would have only a tax on the generation of electricity applicable to all alike as spelled out in Section 72-34-3 NMSA. 1953, supra. While plaintiffs in oral argument asserted that they believe even that situation to be unconstitutional, no authorities supporting such a stance were cited, nor have any come to the attention of the Court. Indeed, plaintiffs tacitly admitted that the United States Supreme Court in 1932 held that

the generation of electricity is a local incident separable from the process of transmission, and that a tax thereon is not per se a tax or a burden on interstate commerce. In the case of Utah Power & L. Co. v Pfost, 286 U.S. 165 (1932), Mr. Justice Sutherland who delivered the opinion of the Court, stated:

"We are satisfied upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture. Cornell v. Coyne, 192 U.S. 418, 428-429. 'Commerce succeeds to manufacture, and is not a part of it.' United States v. E. C. Knight Co., 156 U.S. 1,12." See also South Carolina Power Co. v. South Carolina Tax Commission. 52F(2d)515 (1931); State of Alaska v. Arctic Maid, 366 U.S. 199, 81 S.Ct. 929 (1961).

Utah Power & L. Co. v. Pfost, supra, decided by the United States Supreme Court in 1932 has never been reversed and is still the supreme law of the land.

We must, therefore, inquire only into whether the Gross receipts tax credits provided for by Section 72-16A-16.1. NMSA 1953, supra, so change the character of the Electrical Energy Tax Act as to convert it into an unconstitutional and Federally proscribed law. The Electrical Energy Tax of $.0004 per net kilowatt hour variably amounts to from 1.333% to 2% of the dollar value of the electricity generated as was asserted and

unchallenged in oral argument. For purposes of discussion of that tax in context with the Gross receipts tax, we shall call the Electrical Energy Tax a 2% tax.

Plaintiffs contend that they must pay the full 2% tax on electricity which they generate in New Mexico and sell for consumption in other states, while other manufacturers of electricity in New Mexico, who sell that electricity for consumption in New Mexico, escape the electrical energy tax because they get full credit for that tax so paid upon their gross receipts tax liability to the State of New Mexico. No so, say the defendants. Rather, they assert that manufacturers of electricity who sell the electricity for consumption in New Mexico pay the 2% electrical energy tax plus 2% of the 4% gross receipts tax for which no credit is available, or a total of 4% on the value of the electricity, being a combination of the two types of taxes. Conversely, the local manufacturer-local vendors contend that their local manufacturer-interstate vendor bretheren have only to pay the electrical energy tax of 2% to the State of New Mexico and have no gross receipts tax to pay to the State of New Mexico whatsoever, 2% of the value of the electricity *less* paid to the State of New Mexico than that paid by local manufacturer-local vendors. In the case of Public Utility District No. 2 of Grant County v. State, 82 Wash (2d) 232, 510 P(2d) 206 (1973), one test for the resolution of the issue at hand is set out in the following language:

"In deciding the issue of this appeal, a proper analysis must take the whole scheme of taxation into account to determine whether the actual operation of that taxing structure in its relationship to intrastate

and interstate commerce results in an unconstitutional discrimination against the latter." See also South Carolina Power Co. v. South Carolina Tax Commission, et al supra.

Obviously, when applied to the case at bar, Public Utility District No. 2, supra, when it speaks of the "whole scheme of taxation" would mean the scheme of taxation only of New Mexico and not superimposed thereon any taxes that may or may not thereafter be levied by another or other states. If it were otherwise, any other state, capriciously, could invalidate New Mexico tax laws and play havoc with our lawful right to raise revenue by the mere expedient of levying some tax within that state upon any commodity originating in New Mexico. A New York sales tax or gross receipts tax, under such a false rationale, could invalidate a manufacturer's tax on Indian jewelry manufactured in New Mexico and sold in New York.

By the test set forth in Public Utility District No. 2, supra, plaintiffs pay 2% total tax to New Mexico on the electricity that they send into interstate commerce, whereas, their fellow manufacturer's [sic] of electricity pay 4% total tax to New Mexico on the electricity that they send into intrastate commerce. This is the practical, pragmatic tax result, the substantive result which is not changed a fraction of a percent by semantics, specious reasoning or otherwise. The "whole shceme of taxation" imposed by New Mexico upon the generation and sale of electricity imposes a total tax of 2% interstate and a total tax of 4% intrastate. Certainly, such a "whole scheme of taxation" cannot be said to result in an unconstitutional discrimination against interstate commerce. Should New Mexico eliminate all

credits and reduce the retail gross receipts tax on the sale of electricity from 4% to 2%, the same net result would be achieved as to that electricity now available for a gross receipts tax credit. New Mexico, however, would lose gross receipts revenue on electricity retailed in New Mexico, not under present law available for a tax credit. Such a change in the law, however, would not alter the position of plaintiffs as to any taxes they would have to pay.

Both plaintiffs and defendants, aside from constitutional and statutory provisions and case law that may be applicable to the issues, have advanced arguments which appear to appeal to fundamental fairness and directed to the morality of the situation. Plaintiffs argue that it is unfair to provide for tax credits which others may claim, but which they cannot avail themselves of. Defendants assert that plaintiffs save millions each year by burning coal on site in New Mexico to generate electricity compared to the cost of generating electricity at the next most feasible site outside New Mexico. Further, the ecological damage to New Mexico from plaintiffs [sic] activity is spared of the more populous energy consuming states to which the New Mexico electricity is transmitted. Defendants state that this damage runs into millions each year over and above any receipts from the electrical energy tax. In effect defendants contend that New Mexico should not be an energy satellite of the more populous western states, to her ecological disadvantage, stripped of state revenue on the generation of electricity transmitted to the unscarred states. It would certainly seem reasonable that the founding fathers in placing the commerce clause in the Constitution never envisioned

or intended that it be availed of by industry in one state or the requirements of its inhabitants to make subservient the ecology and quality of life of another state without some countervailing right for some revenue from *all* energy producers flowing to the host state. The fundamental fairness arguments of the defendants would appear to have the greater degree of credibility. Nevertheless, such arguments by either party cannot be persuasive or determinative of any of the legal issues involved in this controversy. Such issues must be resolved in keeping with and solely upon applicable constitutional and statutory provisions and governing case law.

The Tax Reform Act passed by the United States Congress in 1976 was dealt with extensively by defendants in oral argument. Defendants asserted that the original version as introduced in Congress was watered down and revamped so as not to disturb the West Virginia Electricial Energy Tax Law and thus incur the wrath of the Senator from West Virginia, whereby defeat of the bill would have been a certainty; that it was specially retailored and directed at New Mexico. This averment was not refuted or answered by plaintiffs. Be that as it may, whatever the legislative history or motivation, the statutory enactment proceeds with a presumption as to its constitutionality, a principle of statutory construction that cannot be ignored or evaded.

The Tax Reform Act, when its language here is applied, is innocuous, and it does not reach the New Mexico Electrical Energy tax. We need not inquire into its constitutionality unless we first determine that its terms make themselves applicable to the issue.

They are not here applicable. The first sentence of Section 201(a) of that act, supra, prohibits any state from imposing a tax with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers or consumers of that electricity. No one quarrels with that provision. The next sentence defines discrimination as that which results "either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce. No one quarrels with that proposition. As has been demonstrated, the New Mexico total tax on electricity results in a *lesser* tax burden on electricity generated and transmitted in interstate commerce than the total tax on electricity generated and transmitted in intrastate commerce. The *lesser* tax burden does not discriminate against interstate commerce, it is only the greater tax burden which would discriminate. Plaintiffs' position upon this aspect can find support only through a patent convolution of the commerce clause of the United States Constitution.

The claim that the Electrical Energy tax is unconstitutional because it denies plaintiffs equal protection of the law and takes their property without due process of law fundamentally rests upon the same rock as their claim that it violates the commerce clause of the United States Constitution by discrimination against plaintiffs [sic] interstate commerce activity. They have no better or greater validity than their erroneous counterpart.

This case was submitted upon cross motions for summary judgment. All parties are in agreement and have stipulated that there is no substantial issue of fact in the case to be decided by the Court. Consequently, the case is decided upon the principles of law set forth in this memorandum opinion. It follows therefore, that the defendants must prevail and that the complaint of the plaintiffs must be dismissed. Judgment consistent herewith should be entered in favor of defendants.

/s/ EDWIN L. FELTER
DISTRICT JUDGE

APPENDIX B

IN THE
Supreme Court of the State of New Mexico

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY AND TUCSON GAS & ELECTRIC COMPANY,
Plaintiffs-Appellants,

vs.

FRED O'CHESKY, Commissioner of Revenue, Bureau of Revenue and STATE OF NEW MEXICO,
Defendants-Appellees.

No. 11,369

Appeal from the District Court of Santa Fe County
EDWIN L. FELTER, District Judge

Montgomery, Andrews
& Hannahs
Frank Andrews III
Santa Fe, New Mexico

Rodey, Dickason,
Sloan, Akin & Robb
William C. Schaab
Albuquerque, New
Mexico

White, Koch, Kelly &
McCarthy
Benjamin Phillips
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Bigbee, Stephenson,
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OPINION

PAYNE, Justice

Appellants, five major public utility companies who generate electricity in New Mexico, sought a judgment declaring the provisions of the Electrical Energy Tax Act, Ch. 263, 1975 N.M. Laws 1371[1] to be unconstitutional and void. The district court denied their motion for summary judgment and granted summary judgment on a cross-motion filed by the appellee, Commissioner of the Bureau of Revenue. We sustain the trial court.

There was testimony that power plants owned and operated by the utility companies within the State of New Mexico cause an estimated $12,000,000 of environmental damage each year. There was evidence that the socio-economic problems caused by the plants may cost as much as $27,000,000 to remedy. Further testimony indicated that if the utilities were to generate the same amount of electricity at their plants outside of New Mexico it could cost them an additional $124,000,000 annually. New Mexico enacted the Electrical Energy Tax to deal with these conditions. The Act imposes a tax upon the "privilege of generating electricity in this state for the purpose of sale." The provisions of the Act pertinent to this suit are §§ 3[2] and 9[3] Section 3 provides as follows:

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[1] The Act amended §§ 45-4-28 and 72-13-24, N.M.S.A. 1953 and added §§ 72-34-1 through 72-34-6 and 72-16A-16.1.

[2] Section 72-34-3, N.M.S.A. 1953 (Supp. 1975).

[3] Section 72-16A-16.1, N.M.S.A. 1953 (Supp. 1975).

A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

Section 9 provides:

A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, *the amount of such tax paid may be credited against the gross receipts tax due this state.* (Emphasis added.)

Section 3 imposes a 2% tax[1] on all electricity generated in the state. Section 9 provides a tax credit against the 4% gross receipts tax imposed on all retail sales in the state. The ultimate effect is that in-state sales are, as in the past, subject to a total tax burden of 4% while out-of-state sales are subjected to a 2% tax burden which they previously did not have.

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[1] For the sake of clarity in this opinion we will refer to the tax as 2% although it varies slightly and is usually less.

During the pendency of this litigation, the United States Congress enacted the Tax Reform Act of 1976. Section 2121(a) of that Act, 15 U.S.C. § 391 (1976), provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity *which discriminates* against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory *it if results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.* (Emphasis added.)

The appellants argue that New Mexico's Electrical Energy Tax is prohibited by § 2121(a) of the federal act because it discriminates against out-of-state producers. If so, it must give way to the federal act because of the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2.

The operative test of a discriminatory tax under § 2121(a) is:

> [I]f it results, either directly or indirectly, in a *greater tax burden* on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce. (Emphasis added.)

The utilities contend that the credit provisions of the Electricial Energy Act result in a "greater tax burden" on electricity destined for use out-of-state than

on electricity used instate. They misread the section's language. The word "greater" means "larger", not "additional." As used, greater is a word of comparison.

The Electrical Energy Tax does not "directly" place a greater tax burden on electricity destined for out-of-state transmission. All utilities pay the same generating tax at the same rate. Ch. 263, § 3, 1975 N.M. Laws 1371.

To determine whether the Electrical Energy Tax "indirectly" results in a greater burden on electricity destined for out-of-state use as compared to electricity used within the state, the *entire tax structure* of a state as applied to the *particular commodity* which is taxed must be examined. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932).

The test of discrimination is not whether a tax imposes an *additional* burden on out-of-state electricity compared to the situation prior to passage of the tax. The test is whether the generation tax on electricity destined for out-of-state use is larger than the total tax on each unit of electricity subsequently consumed in New Mexico. The gross receipts tax, although reduced by the amount of generation tax, continues to impose a burden on in-state sales of electricity from which out-of-state sales of electricity are exempted. Thus, while the out-of-state electricity must bear an *additional* tax that it was not previously required to bear, payment of this tax does not result in a "greater tax burden" on that electricity.

New Mexico chose to decrease the rate of its sales tax for electricity by allowing the generation tax to be credited against its sales tax. This approach is not condemned by § 212(a). A state has the power to shift the burden of its tax as it feels best as long as it does so in a nondiscriminatory manner. *See Public Utility Dist. No. 2 of Grant County v. State*, 82 Wash. 2d 232, 510 P.2d 206 (1973), *appeal dismissed for want of a substantial federal question*, 414 U.S. 1106 (1974).

Appellants further claim that the Electrical Energy Tax violates the Commerce Clause of the United States Constitution. U.S. Const. art, I, § 8, cl. 3. They claim that the energy tax places an undue burden on interstate commerce. Interstate commerce and its instrumentalities are not immune from state taxation. Interstate commerce must pay its own way. *Western Live Stock v. Bureau*, 303 U.S. 250, 254 (1938).

The test in determining whether the Electrical Energy Tax places an undue burden on interstate commerce, is whether the Act, in its practical application, discriminates against interstate commerce. *Best & Co. v. Maxwell*, 311 U.S. 454, 455, 456 (1940). The courts in passing on this question have employed two tests:

> (1) Whether the tax places an extra burden on interstate commerce not borne by intrastate commerce, or erects barriers, placing out-of-state businesses at a disadvantage when competing locally; *the discrimination test*. (2) Whether the interstate commerce involved is subject to the risk of repeated exactions of the same nature from other states; *the multiple burden test*.

Public Utility, supra, at 209.

Appellants argue that the enrgy tax is contrary to both the discrimination test and the multiple burden test.

(1) *Discrimination Test*

Appellants contend that while the energy tax on its face may not violate the Commerce Clause, the operation of the credit provisions contained in § 9 of the Act work to discriminate against the out-of-state producer. We do not agree with this analysis.

The appellants have failed to show that the energy tax as applied places out-of-state producers at a disadvantage when competing against local producers. The out-of-state producers who retail electricity inside the state get the same tax credit as the in-state producers. If electricity consumed in New Mexico is subject to an electrical energy tax imposed by another state it can also take advantage of the credit provisions of § 9. Further, the electricity that is retailed outside the state is not in competition with the electricity consumed within the state. Without competition there can be no discrimination. *Public Utility, supra.*

In the present case the Legislature has determined that instead of a strict 4% gross receipts tax on the retail sale of electricity they would impose a 2% tax on the generation and a 2% tax on the retail sale. In this instance we find no discrimination. All producers of electricity are subject to the energy tax. All producers who retail their electricity in New Mexico can take

advantage of the credits provided in § 9. The energy tax does not place the out-of-state producer at a disadvantage when competing against the in-state producer.

(2) *Multiple Burden Test*

Appellants also argue that the energy tax is discriminatory because its sole and exclusive economic impact is upon an interstate transaction — the transmission of electricity for consumption in other states. They cite as authority, *Mich.-Wis. Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954). In that case the United States Supreme Court invalidated a Texas tax on the occupation of "gathering gas," measured by the volume of gas "taken," because the incidence of the tax had been delayed beyond the step where production has ceased and transmission in interstate commerce had begun. The Court held that the incidence of the tax was "on the exit of gas from the State," and found that the gathering of the gas into transmission lines was an integral part of interstate commerce. *Id.* at 167. Had Texas been allowed to impose such a tax, the door would have been opened for other states on the line to tax the volume of gas in the pipeline as it crossed their boundaries. The net effect would have been "to resurrect the customs barriers which the Commerce Clause was designed to eliminate." *Id.* at 170.

Appellants contend that the Electrical Energy Tax Act carries the vice condemned in *Michigan-Wisconsin* further, stating that it is only interstate transmission and consumption of electricity that incurs any monetary liability by reason of the energy tax. We cannot agree with their analysis.

There is a distinct difference between the generation of electricity and the transmission of electricity as it relates to interstate commerce. The United States Supreme Court has held that:

> [T]he process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture.

Utah Power & L. Co. v. Pfost, 286 U.S. 165, 181 (1932).

The energy tax is a tax on the generation of electricity and electricity can only be generated once. Since the electricity is generated in the State of New Mexico, only New Mexico can impose a tax on the generation. Only if the tax were imposed upon some later, nonlocal process would the *Michigan-Wisconsin* case be applicable.

For the reasons stated, we affirm the trial court and hold the Electrical Energy Tax to be constitutional and valid.

IT IS SO ORDERED.

/s/ H. VERN PAYNE
H. VERN PAYNE, Justice

WE CONCUR:

/s/ DAN SOSA, JR.
DAN SOSA, JR., Justice

/s/ MACK EASLEY
MACK EASLEY, Justice

APPENDIX C

IN THE

Supreme Court of the State of New Mexico

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY AND TUCSON GAS & ELECTRIC COMPANY,
Plaintiffs-Appellants,

vs.

FRED O'CHESKEY, Commissioner of Revenue, Bureau of Revenue and STATE OF NEW MEXICO,
Defendants-Appellees.

No. 11369

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Arizona Public Service Company, El Paso Electric Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company and Tucson Gas & Electric Company, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico, affirming the judg-

ment of the District Court of Santa Fe County, entered in this action on March 23, 1978. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated this 11th day of April, 1978.

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IN THE

Supreme Court of the State of New Mexico

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs-Appellants,*	No. 11369
vs.	
FRED O'CHESKEY, Commissioner of Revenue, Bureau of Revenue and STATE OF NEW MEXICO, *Defendants-Appellees.*	

AFFIDAVIT

STATE OF NEW MEXICO } ss.
COUNTY OF SANTA FE }

I, Richard N. Carpenter, being first duly sworn and upon oath, state that I caused three (3) copies of the foregoing Notice of Appeal, dated April 11, 1978, to be served on counsel of record for each adverse party by depositing the same on October 12, 1978 in a United States post office or mail box, with first class postage

prepaid, addressed to counsel of record at his post office address, to wit,

Toney Anaya
Attorney General of New Mexico
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Santa Fe, New Mexico 87503

Jan Unna
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Special Assistants Attorney General
Post Office Box 630
Santa Fe, New Mexico 87501,

all in compliance with Rules 10 and 33 of the Rules of the Supreme Court of the United States.

/s/ RICHARD N. CARPENTER
Richard N. Carpenter

SUBSCRIBED AND SWORN to before me this 12th day of April, 1978.

Notary Public

My commission expires:

February 21, 1981.

APPENDIX D

CHAPTER 263

AN ACT

RELATING TO TAXATION; IMPOSING A TAX ON THE GENERATION OF ELECTRICITY; AMENDING SECTIONS 45-4-28 and 72-13-24 NMSA 1953 (BEING LAWS 1939, CHAPTER 47, SECTION 28 AND LAWS 1965, CHAPTER 248, SECTION 12, AS AMENDED); ENACTING A NEW SECTION 72-16A-16.1 NMSA 1953.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. *Short Title.* Sections 1 through 6 of this act may be cited as the "Electrical Energy Tax Act." [§72-34-1, NMSA 1953 (1975 P.S.)]

Section 2. *Definitions.* As used in the Electrical Energy Tax Act:

A. "bureau" means the New Mexico bureau of revenue;

B. "generation" includes manufacture and production;

C. "electricity" includes electrical energy and electrical power;

D. "person" means any individual, estate, trust, receiver, cooperative association, electric cooperative, club, corporation, company, firm, partnership, joint venture, syndicate, association, irrigation district, electrical irrigation district and any utility owned or operated by a county or municipality, and also means

to the extent permitted by law, any federal, state or other governmental unit or subdivision or an agency, department or instrumentality; and

E. "sale" means selling or transferring to any person for consumption, use or resale and includes barter and exchange. [§72-34-2, NMSA 1953 (1975 P.S.)]

Section 3. *Imposition of Tax-Rate-Denomination As Electrical Energy Tax.*

A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

B. The tax imposed by this section shall be referred to as the "electrical energy tax." [§72-34-3, NMSA 1953 (1975 P.S.)]

Section 4. *Measurement and Recording of Kilowatt Hours of Electricity.* Persons subject to the imposition of the electrical energy tax shall maintain accurate measuring devices and records to measure and record the daily and cumulative monthly and yearly totals of kilowatt hours of electricity generated or distributed in this state. [§72-34-4, NMSA 1953 (1975 P.S.)]

Section 5. *Reports-Remittances.* Every person subject to the imposition of the electrical energy tax shall file a return on forms provided by and with the information required by the bureau and shall pay the tax

due on or before the twenty-fifth day of the second month following the month in which the taxable event occurs. [§72-34-5, NMSA 1953 (1975 P.S.)]

Section 6. *Relief From Other Taxes.* Unless otherwise specified by statute the imposition of the electrical energy tax shall not act to relieve any person or activity from any other tax levied by the State of New Mexico or its political subdivisions. [§72-34-6, NMSA 1953 (1975 P.S.)]

Section 7. Section 45-4-28 NMSA 1953 (being Laws 1939, Chapter 47, Section 28, as amended) is amended to read:

"45-4-28. *Taxation.* Cooperative and foreign corporations, transacting business in this state pursuant to the provisions of Section 45-4-1 through 45-4-32 NMSA 1953 shall pay annually, on or before July 1, to the state corporation commission, a tax of ten dollars ($10.00) for each one hundred persons or fraction thereof to whom electricity is supplied within this state which tax shall be in lieu of all other taxes except those provided in the Gross Receipts and Compensating Tax Act, and the Electrical Energy Tax Act; provided, however, that in the event a contract has been entered into by a rural electric cooperative and a power consumer prior to February 1, 1961, and such contract does not contain an escalator clause providing for an increase for added tax liability on the cooperative, then the sale to such power consumer shall be exempt until the expiration, extension or renewal of the contract."

Section 8. Section 72-12-24 NMSA 1953 (being Laws 1965, Chapter 248, Section 12, as amended) is amended to read:

"72-13-24. *Receipts-Disbursements-Distribution.*

A. All money received by the bureau shall be deposited with the state treasurer before the close of the next succeeding business day after receipt of the money.

B. Money received or disbursed by the bureau shall be accounted for by the commissioner as required by law or regulation of the director of the department of finance and administration.

C. Disbursements for tax credits, refunds and the payment of interest shall be made by the department of finance and administration upon request and certification of their appropriateness by the commissioner or his delegate. The state treasurer shall create a suspense fund for the purpose of making the disbursements authorized by the Tax Administration Act. All revenues collected pursuant to the provisions of Sections 72-15-1 through 72-15-37 NMSA 1953, the Income Tax Act, the Withholding Tax Act, the Gross Receipts and Compensating Tax Act, the Resources Excise Tax Act, the Liquor Excise Tax Act and the Electrical Energy Tax Act shall be credited to this suspense fund and are appropriated for the purpose of making disbursements for tax credits, refunds and the payment of interest.

D. On the last day of each month, any money remaining in the suspense fund after the necessary disbursements have been made shall be identified by tax source and transferred from the suspense fund,

one-half of the receipts attributable to the electrical energy tax shall be transferred to the "electrical energy fund," hereby created, and the remainder to the state general fund, except that before the remaining money is transferred to the general fund, an amount equal to one percent of the taxable gross receipts reported for the month of deposit:

(1) for each municipality shall be distributed to each municipality; and

(2) by taxpayers who have business locations on an Indian reservation or pueblo grant in an area which is contiguous to a municipality and in which the municipality performs services pursuant to a contract between the municipality and the Indian tribe or Indian pueblo shall be distributed to the municipality if:

(a) the contract describes the area in which the municipality is required to perform services and requires the municipality to perform services that are substantially the same as the services the municipality performs for itself; and

(b) the governing body of the municipality has submitted a copy of the contract to the commissioner of revenue.

E. Disbursements to cover expenditures of the bureau shall be made only upon approval of the commissioner or his delegate.

F. Miscellaneous receipts from charges made by the bureau to defray expenses pursuant to the provisions

of Section 72-13-23 and 72-13-39 NMSA 1953 and similar charges are appropriated to the bureau for its use."

Section 9. A new Section 72-16A-16.1 NMSA 1953 is enacted to read:

"72-16A-16.1. *Credit-Gross Receipts Tax.*

A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit."

Section 10. *Legislative Intent.* It is the intent of the legislature that this entire 1975 act be considered not severable, and should any part hereof be declared unconstitutional, the entire act should be declared void. [not codified]

Section 11. *Effective Date.* The effective date of the provisions of this act is July 1, 1975. [not codified]

APPENDIX E

G.R. REGULATION 16.1:1 - CREDIT OF ELECTRICAL ENERGY TAX ON ELECTRICITY GENERATED IN NEW MEXICO AGAINST GROSS RECEIPTS TAX —

A. For purposes of the credit against gross receipts tax, "consumption or consumed" also includes that quantity of electricity lost through the transmission and distribution process which occurs in New Mexico.

B. Section 72-16A-16.1(C) requires that a potential credit be assigned to persons purchasing electricity for resale:

1) to buyers who will potentially consume or use the electricity in New Mexico, or

2) to buyers who will potentially resell the electricity for consumption in New Mexico;

on which an electrical energy tax or similar tax has been levied by New Mexico, by another state or by political subdivision thereof and paid by the seller.

Each seller of electricity as described in this paragraph must assign, to each buyer described in subparagraphs (1) and (2) of this paragraph, a pro rata share of the total available potential credit provided in Section 72-16A-16.1 (A) or (B).

C. It shall be presumed that the potential credit against gross receipts tax as provided by Section 72-16A-16.1(C) shall have been assigned when the buyer

is in receipt of an invoice from the seller separately stating the amount of the applicable Electrical Energy Tax or similar tax as provided in Section 72-16A-16.1.

In the absence of bad faith, a wholesale purchaser in New Mexico of electricity may rely upon such an invoice in claiming a credit under Section 72-16A-16.1.

D.

1) That portion of the potential credit assigned to a buyer further reselling the electricity for consumption in New Mexico may be credited by the assignee against the gross receipts tax due New Mexico on receipts from the sale of electricity for any month subsequent to July 1, 1975.

2) That portion of the potential credit assigned to a buyer further reselling the electricity at wholesale to buyers who will resell the electricity for consumption in New Mexico must be reassigned to the subsequent buyer as provided in paragraph B of this regulation.

3) That amount of electrical energy tax credit which is not assigned to appropriate buyers and which is otherwise creditable under Section 72-16A-16.1, may be credited against gross receipts tax due New Mexico on receipts from the sale of electricity for any reporting month subsequent to July 1, 1975.

E. To be allowable the credit must be claimed within the period provided in Section 72-13-40(B). Reflecting a credit on the taxpayer's CRS-1 return or attachme t thereto will be treated as a claim for credit.

APPENDIX F

Sections 11-13-2d and 11-13-2m of the Code of West Virginia, as enacted by Senate Bill No. 163 (effective April 1, 1978):

§11-13-2d. Public service or utility business.

Upon any person engaging or continuing within this state in any public service or utility business, except railroad, railroad car, express, pipeline, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to gross income of the business multiplied by the respective rates as follows: Street and interurban and electric railways, one and four-tenths percent; water companies, four and four-tenths percent; except as to income received by municipally owned water plants; electric light and power companies, four percent on sales and demand charges for domestic purposes and commercial lighting and four percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants producing or purchasing electricity and distributing same: *Provided*, That electric light and power companies which engage in the supplying of public service but which do not generate or produce electric power shall be taxed on the gross income derived therefrom at the rate of three percent on sales and demand charges for domestic purposes and commercial lighting and three percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants: *Provid-*

ed, however, That the sale of electric power under this section shall be taxed at the rate of two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year; natural gas companies, four and twenty-nine hundredths percent on the gross income; toll bridge companies, four and twenty-nine hundredths percent; and upon all other public service or utility business, two and eighty-six hundredths percent. The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States or between this state and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article.

* * * *

§11-13-2m. Business of generating or producing electric power; exception; rates.

(1) Upon every person engaging or continuing within this state in the business of generating or producing electric power for sale, profit or commercial use, either directly or though the activity of others, in whole or in part, when the sale thereof is not subject to tax under section two-d of this article, the amount of the tax to

be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate of four percent, except that the rate shall be two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year.

(2) The measure of this tax shall be the value of all electric power generated or produced in this state for sale, profit or commercial use, regardless of the place of sale or the fact that transmission may be to points outside this state: *Provided,* That the gross income received by municipally owned plants generating or producing electricity shall not be subject to tax under this article.

APPENDIX G

Section 1101(b) of the Pennsylvania Tax Reform Code of 1971, as enacted and amended by Pennsylvania Act of Assembly No. 1977-100 (effective December 21, 1977):

(b) Electric Light, Waterpower and Hydro-electric Utilities.—Every electric light company, waterpower company and hydro-electric company now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other state or by the United States or any foreign government and doing business in this Commonwealth, and every limited partnership, association, joint-stock association, copartnership, person or persons, engaged in electric light and power business, waterpower business and hydro-electric business in this Commonwealth, shall pay to the State Treasurer, through the Department of Revenue, a tax of forty-five mills upon each dollar of the gross receipts of the corporation, company or association, limited partnership, joint-stock association, copartnership, person or persons, received from:

(1) the sales of electric energy within this State, except gross receipts derived from the sales for resale of electric energy to persons, partnerships, associations, corporations or political subdivisions subject to the tax imposed by this subsection upon gross receipts derived from such resale; and

(2) the sales of electric energy produced in Pennsylvania and made outside of Pennsylvania according to the following apportionment formula: except for gross receipts derived from sales under clause (1), the gross receipts from all sales of electricity of the producer shall be apportioned to the Commonwealth of Pennsylvania by the ratio of the producer's operating and maintenance expenses in Pennsylvania and depreciation attributable to property in Pennsylvania to the producer's total operating and maintenance expenses and depreciation.

IN THE

Supreme Court of the United States

No. 77-1810 OCTOBER TERM, 1978

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUSCON GAS & ELECTRIC COMPANY,

Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO

Appellees.

On Appeal From The Supreme Court of New Mexico

BRIEF OF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

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INTEREST OF AMICI CURIAE

The State of New York, the State of New Jersey, and the State of Maryland are interested in this matter because it involves the interpretation of Federal Constitutional provisions and of an Act of Congress (15 U.S.C. § 391) as they apply to state taxation of electric generation and transmission, which interpretation might be controlling with respect to a tax imposed by the Commonwealth of Pennsylvania (Act No. 1977-100) on gross receipts from electric energy generated in Pennsylvania and sold at retail in, *inter alia,* New York, New Jersey and Maryland.

ARGUMENT

The purpose of this filing is to present to the Court facts which clearly indicate that the instant appeal warrants plenary consideration by this Court in order to resolve substantial questions concerning the validity, interpretation and application of Section 2121(a) of the Tax Reform Act of 1976 (15 U.S.C. § 391) and the ability of one state to raise revenue by imposing a tax on or with respect to electric energy, which tax is borne only by consumers outside the taxing state.

On December 21, 1977, Pennsylvania enacted Act No. 1977-100 (Appendix G to the Jurisdictional Statement) which extended Pennsylvania's gross receipts tax on electric companies to include a levy on gross receipts from sales of electric energy produced in Pennsylvania and made outside Pennsylvania.*

Neighboring states, recognizing that the burden of this new Pennsylvania tax would fall exclusively on their consumer residents, responded.

In New York, under the provisions of the Niagara Redevelopment Act, the Power Authority of the State of New York is required to make available to public bodies and non-profit cooperatives located in neighboring States up to 20 percent of the so-called "preference power" generated by the Niagara Power Project. 16 U.S.C. § 836(b)(2).

For many years Allegheny Electric Cooperative, Inc. ("Allegheny"), a Pennsylvania-based electric cooperative, had received power from the Niagara Power Project under this provision. In early 1978, a replacement of an expiring contract with Allegheny was submitted to Governor Hugh L. Carey of New York for his approval, as required by applicable state law. On February 3, 1978,

* There is presently an action pending in the Commonwealth Court of Pennsylvania, styled *Baltimore Gas and Electric Company, et al.* v. *Milt Lopus, Secretary of Revenue of the Commonwealth of Pennsylvania, et al.*, and docketed to No. 643 Commonwealth Docket, 1978, in which Act No. 1977-100 is challenged.

Governor Carey disapproved the renewal contract, stating, *inter alia:*

> Of all the States interested in purchasing Niagara Power, New York's average cost of electricity to residential consumers is the highest. *That burden has worsened by Pennsylvania's recent action imposing a gross receipts tax on electricity generated in the state and sold to New York residents.*
>
> The people of this State made possible the construction of the Niagara Power Project. Residential consumers in this State pay the highest electric power costs in the nation, but they receive a disproportionately small amount of Niagara power. My first commitment is, as it must be, to the citizens of New York State. Under the present circumstances, I have no choice but to remand the contracts to the Authority for consideration of the issue of what amount of Niagara power constitutes a "reasonable portion" to be available to our neighbor states. (Emphasis supplied).

The full text of Governor Carey's statement is attached as Appendix A hereto.

In New Jersey, on June 22, 1978, Bill No. 1525 was introduced in the General Assembly of the State of New Jersey. This bill seeks to impose a tax on gross receipts received from sales of electric energy produced in New Jersey and made outside New Jersey. The proposed tax is patterned after the Pennsylvania tax, and the bill provides that the act shall remain in effect "only as long as Public Law 340 (Act 100 of 1977) of the Commonwealth of Pennsylvania or comparable legislation remains in effect." A copy of Bill No. 1525 is attached as Appendix B hereto.

The Court has recognized the temptation on the part of the officials of one state to craft a scheme which im-

poses burdens on out-of-state residents without any adverse impact on the local electorate. The Court, has, for example, declined to grant special deference to state action having an impact on interstate commerce where the questioned state action does not fall "on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome" state action. *Raymond Motor Trans. Inc.* v. *Rice,* 46 U.S.L.W. 4109, 4113 n.18 (February 21, 1978).**

Unless this Court continues to subject such clever and attractive schemes to close scrutiny, and to give full effect to relief legislation, such as § 2121 of the Tax Reform Act, obtained from the Congress through the national political process, the States adversely affected will have no choice but to respond with countervailing economic measures, thus Balkanizing the national economy.

In their Jurisdictional Statement, appellants quote the remarks of Senator Fannin during debate on the "Domenici Amendment" which would have stricken the provision that was to become § 2121 of the Tax Reform Act; Senator Fannin stated: "We are talking about what could happen all over the United States. We are talking about a potential taxing war on the sale of power which could be devastating." 122 Cong. Rec. S12713 (daily ed. July 28, 1976).

The general importance of the issues presented in this appeal and the reality of the threat to which Senator Fannin and the United States Congress spoke is evidenced by the recent experience of Pennsylvania, New York and New Jersey.

** The various allegedly "equivalent tax schemes" cited by appellees in support of the decision below (Motion to Dismiss or Affirm, page 18) all would have a noticeable effect on New Mexico residents; that fact may well account for New Mexico's decision to reject such schemes.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted in this matter.

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APPENDIX A

STATEMENT BY GOVERNOR HUGH L. CAREY
On Contracts for the Sale of
Power From Niagara Power Project

Allegheny Electric Cooperative, Inc.
Public Service Board of the State of Vermont

There are before me for approval or disapproval two contracts for the sale of power from the Niagara Power Project of the Power Authority of the State of New York. These contracts have been negotiated by the Authority pursuant to the provisions of the Niagara Redevelopment Act, 16 U.S.C. Sec. 836, which require one-half of the power generated at the Niagara Project to be made available for the consumers, giving preference to public bodies and nonprofit coooperatives. Of this 50 percent reserve, a reasonable portion of the power—up to 20 percent—must be made available in neighboring states.

The proposed contracts would allocate 110 megawatts of firm power and 20 megawatts of firm peaking power to Allegheny Electric Cooperative, Inc., a Pennsylvania-based electric cooperative, and 40 megawatts of firm power and 10 megawatts of firm peaking power to the Public Service Board of the State of Vermont. These contracts, which would expire on June 30, 1985, would replace existing contracts with Allegheny and Vermont which expire on February 19, 1978, and December 31, 1979, respectively.

In anticipation of the expiration of the existing contracts, the Authority solicited applications from the states bordering New York for the Niagara Project power which would be coming available. Applications were submitted by the Massachusetts Municipal Wholesale Electric Company (Massachusetts), the Connecticut Municipal Electric Energy Cooperative (Connecticut), American Municipal Power-Ohio, Inc. (AMP-Ohio) and the Borough of Lansdale, Pennsylvania, (Lansdale), as well as Allegheny and Vermont. Because of the limited amount of Niagara hydro power available for out-of-state sales, the Authority was required to determine what amounts of the low-cost power should be allocated to which of New York's neighbor states.

From the evidence before it, the Authority concluded that AMP-Ohio and Lansdale were not qualified recipients, since among other considerations, neither entity had concluded the arrangements necessary for wheeling the power. The Authority also determined that the potential savings which would be realized by Allegheny, Massachusetts and Vermont (24.5, 21.0 and 24.3 mills per kilowatt-hour respectively) from the purchase of Niagara power would be roughly comparable, while the savings which would be achieved by Connecticut would be considerably less (13.7 mills per kilowatt-hour) than that of the other applicants. In contrast, rural and residential consumers in the south-eastern region of this State would save approximately 32 mills per kilowatt-hour if the power were allocated for their use. Yet, under the present allocations of Niagara power, Vermont, in 1976, received 5.96 megawatt-hours per rural and residential customer; and New York received a mere 1.91 megawatt-hours per rural and residential customer. Proposed allocations would change those ratios only marginally. Of all the States interested in purchasing Niagara power, New York's average cost of electricity to residential consumers is the highest. That burden has worsened by Pennsylvania's recent action imposing a gross receipts tax on electricity generated in the state and sold to New York residents.

The people of this State made possible the construction of the Niagara Power Project. Residential consumers in this State pay the highest electric power costs in the nation, but they receive a disproportionately small amount of Niagara power. My first commitment is, as it must be,

to the citizens of New York State. Under the present circumstances, I have no choice but to remand the contracts to the Authority for consideration of the issue of what amount of Niagara power constitutes a "reasonable portion" to be available to our neighbor states. The State of New York will, of course, continue to work closely with its sister states to establish regional mechanisms which ensure an adequate supply of energy at reasonable rates.

The contracts are disapproved.

HUGH L. CAREY

February 3, 1978

APPENDIX B

ASSEMBLY, No. 1525

STATE OF NEW JERSEY

INTRODUCED JUNE 22, 1978

By Assemblymen GEWERTZ, GORMAN, RAND, NEWMAN, SCHUCK, DOYLE, Assemblywoman CROCE, and Assemblyman HERMAN

Referred to Committee on Taxation

AN ACT providing for the taxation of gross receipts derived from the sale of electric energy produced in the State and sold out of State, providing for the establishing of a Utility Rate Stabilization Fund and the paying of subsidies to utility companies to reduce utility rate increases caused by the taxation of the sale of electric energy in New Jersey by other states.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. As used in this act "electric light company, water power company and hydroelectric company" means any company organized or to be organized pursuant to the laws of any state for the purpose of constructing, maintaining and operating works for the supply and distribution of electricity for electric light, heat or power.

2. a. Every electric light company, water power company and hydroelectric company now or hereafter incorporated or organized by or under any law of this State, or now or hereafter organized or incorporated by any

other state or by the United States or any foreign government and doing business in this State, and every limited partnership, association, joint-stock association, copartnership, person or persons, engaged in electric light and power business, water power business and hydroelectric business in this State, shall pay to the State Treasurer, through the Division of Taxation, a tax of $0.03 upon each dollar of the gross receipts of the corporation, company or association, limited partnership, joint-stock association copartnership, person or persons, received from the sales of electric energy produced in New Jersey and made outside of New Jersey according to the following apportionment formula. The gross receipts from all sales of electricity of the producer shall be apportioned to the State of New Jersey by the ratio of the producer's operating and maintenance expenses in New Jersey and depreciation attributable to property in New Jersey to the producer's total operating and maintenance expenses and depreciation.

b. Payment of Tax; Reports. The said taxes imposed under subsection (a) shall be paid within the time prescribed by law, and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of the said company, copartnership, limited partnership, association, joint-stock association or corporation, or person or persons, to transmit to the Division of Taxation on or before April 15 of each year an annual report, and under oath or affirmation, of the amount of gross receipts of the said companies, copartnerships, corporations, associations, joint-stock associations, limited partnerships, person or persons, derived from all sources, and of gross receipts from business done wholly within this State and in the case of electric energy producers that transmit energy to other states, a compilation of the relevant information regarding operating and

maintenance expenses and depreciation, during the period of 12 months immediately preceding January 1 of each year. It shall be the further duty of the treasurer or other proper officer of every such corporation or association and every individual liable by law to report or pay said taxes imposed under subsection a. except municipalities to transmit to the Division of Taxation on or before April 30 of each year, a tentative report in like form and manner for each 12-month period beginning January 1, of each year. The tentative report shall set forth (i) the amount of gross receipts received in the period of 12 months next preceding and reported in the annual report; or (ii) the gross receipts received in the first 3 months of the current period of 12 months; and (iii) such other information as the Division of Taxation may require.

c. Tax computation. Upon the date its tentative report is required to be made, for the year 1978 and each year thereafter the corporation, association or individual making a tentative report shall transmit such report to the Division of Taxation on account of the tax due for the current period of 12 months and compute and make payment of the tentative tax with such report.

d. Time to file reports. The time for filing annual reports may be extended, estimated settlements may be made by the Division of Taxation if reports are not filed, and the penalties for failing to file reports and pay the taxes imposed under subsection (a) shall be as prescribed by the laws defining the powers and duties of the Division of Taxation. In any case where the works of any corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons are operated by another corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons, the taxes imposed under subsection (a) shall be apportioned between the corporation, compa-

nies, copartnerships, associations, joint-stock associations, limited partnerships, person or persons in accordance with the terms of their respective leases or agreements, but for the payment of the said taxes the State shall first look to the corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons operating the works, and upon payment by the said company, corporation, copartnership, association, joint-stock association, limited partnership, person or persons of a tax upon the receipts, as herein provided, derived from the operation thereof, no other corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons shall be held liable for any tax imposed under subsection (a) upon the proportion of said receipts received by said corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons for the use of said works.

e. Application to municipalities. This act shall be construed to apply to municipalities, and to impose a tax upon the gross receipts derived from any municipality owned or operated public utility or from any public utility service furnished by any municipality, except that gross receipts shall be exempt from the tax, to the extent that such gross receipts are derived from business done inside the limits of the municipality, owning or operating the public utility or furnishing the public utility service.

3. The revenue collected by the Division of Taxation pursuant to this act shall be deposited with the State Treasurer in a special Utility Rate Stabilization Fund established by the treasurer.

4. a. Whenever any electric light company, water power company or hydroelectric company applies to the Board of Public Utilities for a rate increase based in whole or in part on an increase in costs resulting from

taxes paid to another state on the gross receipts from the sales of electricity produced in that state and sold in New Jersey, and the board verifies the authenticity of said increased costs, said company may apply to the State Treasurer for payment of a subsidy to offset such increased costs in whole or in part and shall be granted such subsidy from the Utility Rate Stabilization Fund in such percentage as the treasurer determines is equitable and as the amount deposited in the fund shall allow. The treasurer, after consultation with the Board of Public Utilities, may adopt appropriate regulations or take other necessary actions to insure that revenues provided from the fund are utilized for rate relief.

b. The amount of rate increase requested by any electric light company, water power company or hydroelectric company based on an increase in costs due in whole or in part to an increase in taxes or set forth in subsection a. of this section shall be denied or reduced in direct proportion as the subsidy paid pursuant to subsection a. offsets the increase in costs resulting from the tax increase.

5. Any company subject to the gross receipts tax imposed by this act may deduct from their tax liability under this act, taxes they have paid on their gross receipts, within the same tax period, pursuant to P. L. 1940, c. 4 (C. 54:30A-16 et seq.) and P. L. 1940, c. 5 (C. 54:30A-49 et seq.)

6. This act shall take effect on the first day of the month following enactment and shall remain in effect only as long as Public Law 340 (Act 100 of 1977) of the Commonwealth of Pennsylvania or comparable legislation remains in effect.

STATEMENT

The Commonwealth of Pennsylvania recently imposed a tax on gross receipts of utility companies based on the sale of electricity produced in Pennsylvania but sold out of the State. It is estimated that Pennsylvania will realize $10,000,000.00 in tax receipts from this tax based on sales of electricity in New Jersey. Utility companies are expected to increase their rates to New Jersey consumers in such amount as it is necessary to offset their $10,000,000.00 tax increase.

This bill imposes a gross receipts tax on electricity produce in New Jersey and sold out of state. The revenue derived from this tax will be deposited in a Utility Rate Stabilization Fund and used to alleviate utility rate increases based on out of state gross receipt taxes. The legislation is made expressly contingent upon the continuance of the Pennsylvania tax.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,
Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO,
Appellees.

On Appeal From The Supreme Court of New Mexico

JURISDICTIONAL STATEMENT FILED JUNE 21, 1978
PROBABLE JURISDICTION NOTED OCTOBER 10, 1978

TABLE OF CONTENTS

Docket Entries (New Mexico Supreme Court)

SUPREME COURT OF NEW MEXICO

DOCKET No. 11369

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY AND TUCSON GAS & ELECTRIC COMPANY,

Plaintiffs-Appellants,

VS.

FRED O'CHESKY, Commissioner of Revenue, BUREAU OF REVENUE AND STATE OF NEW MEXICO,

Defendants-Appellees.

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Charles T. DuMars, 1121 Kent NW 87102 (Amicus Curiae)

CIVIL APPEAL FROM DISTRICT COURT SANTA FE (50245)
COUNTY

Judgment 2/18/77

Notice of Appeal 3/18/77

Edwin L. Felter, Judge

CASH ACCOUNT FOR COSTS

DATE	RECEIVED FROM OF PAID TO	RECEIVED	DISBURSED
1977			
April 11	Bigbee Stephenson Carpenter & Crout	$20.00	
	State Treasurer		$16.00
Sept. 12	Record Bound		

CITATIONS—Amicus Curiae

_____N. MEX._____ 576 PAC. 2ND 291

DATE		PROCEEDINGS
1977		
April	11	Skeleton Transcript
June	30	3 Transcript of Record (5 volumes) Request for Oral Argument
July	29	Brief in Chief
August	24	Motion to extend Answer Brief to September 26—app'd
September	26	Answer Brief
October	5	Motion to extend Reply Brief to October 17—app'd

	17	Reply Brief Certificate of Service
November	9	Argued and Submitted
1978		
March	23	Opinion (Payne/Sosa-Easley) Order affirming
April	4	Mandate
	10	Receipt for Mandate
	12	Notice of Appeal to United States Supreme Court Affidavit of Service
June	13	Request for Certification and Transmission Affidavit of Mailing (attached to request)
	15	Certification and Transmission of Record

Docket Entries (Santa Fe District Court)

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, ET AL,
Plaintiffs

VS.

FRED O'CHESKEY, *Defendants.*

TYPE OF CASE—Declaratory Judgment FEE $20.00

DATE	DIV. II	PROCEEDINGS	MISCELLANEOUS ACCOUNTS	REMARKS

1975

Sept. 18—Docket Fee
18—Complaint, filed
18—Summons, issued
19—Summons, returned & filed

Oct. 10—Motion for extension of time to move or plead, filed

10—Entry of Appearance, filed
20—Order, filed & entered

Nov. 10—Memorandum of Points and Authorities In Support of Motion To Intervene, filed
10—Motion For Leave To Intervene, filed
10—Answer In Intervention, filed
10—Motion To Dismiss, filed
13—Supplemental Memorandum In Support of Motion to Intervene, filed

21—Plaintiff's Brief in Opposition to Motion for Intervention, filed
25—Stipulation, filed
25—Order, filed and entered

Dec. 18—Defendants' Memorandum Opposing Intervention, filed
22—Plaintiffs Brief in Opposition to Defendants' Motion to Dismiss, filed

1976

Jan. 12—Petition for Leave For Defendants To File A Reply to Plaintiff's Brief In Opposition, filed
12—Order, filed and entered
12—Defendants' Reply to Plaintiff's Brief In Opposition To the Motion to Dismiss, filed
19—Notice of Hearing, filed

1976 50245 Arizona vs Fred O'Cheskey

Feb. 13—Entry of Appearance, filed
23—Supplemental Brief In Support of Defendants 12(b)(6) Motion to Dismiss, filed

May 26—Order, filed and entered

June 4—Supplemental Order, filed & entered
4—Application for Order Allowing Interlocutory Appeal, filed

July 21—Joint Answer, filed

Aug. 16—Notice of Hearing, filed
25—Interrogatories, filed

Sept. 3—Objection to Interrogatories & Notice of Hearing, filed
14—Answers to Defendant Bureau of Revenue's Interrogatories, filed

15—Brief In Support of Plaintiffs' Motion For Summary Judgment, filed
15—Plaintiff's Motion For Summary Judgment, filed
20—Notice of Hearing, filed
21—Notice of Hearing, filed
23—Order, filed & entered

Oct. 6—Supplemental Interrogatories, filed

1976 50245 Arizona vs O'Cheskey et al

Oct. 12—Notice of hearing, filed

21—Plaintiffs' Supplemental Answers to Interrogatories, filed
22—Answer to Defendants Supplemental Interrogatories, filed
22—Order, filed and entered
22—First Amended Complaint, filed
25—Motion to Compel Answers to Interrogatories, filed
27—Restated Interrogatory 8, filed
29—Withdrawal as Counsel & Consent to Substitution of Counsel, filed

Nov. 2—Order filed & entered

4—Notice of hearing, filed
5—Plaintiffs Supplemental Motion for Summary Judgment, filed
5—Brief in Support of Plaintiffs Supplemental Motion for Summary Judgment, filed
8—Answer to the first amended complaint, filed
9—Plaintiffs Answer to Restated Interrogatory 8, filed

1976 No. 50245—Arizona Public Service vs O'Cheskey

Dec. 2—Objection to Plaintiff's Affidavits No. 6 & No. 7, filed

2—Memorandum in Support of Defendants' Objection to Affidavits 6 & 7, filed
2—Defendants' Motion for Summary Judgment, filed
7—Notice of Hearing, filed
16—Memo in Opposition to Defendant Objections to Plaintiff's Affidavits 6 & 7 to Plaintiff's Motion for Summary Judgment, filed
20—Certificate of Service, filed
21—Brief In Support of Defendants' Motion for Summary Judgment, filed

1977

Jan. 1—Notice of Hearing, filed
20—Plaintiffs Response To Defendants Brief In Support of Defendants' Motion For Summary Judgment, filed

Jan. 31—Memorandum Opinion filed & entered
Bf. 313P. 404-414

Feb. 18—Judgment, filed & entered Bf. 315P. 250-251

Mar. 18—Notice of Appeal, filed (vnm)
23—Clerk's Certificate, issued & filed
23—Request For Transcript of Record Proper, filed
30—Appellees' Designation of Additional Parts of the Record, filed

May 27—Certificate of Satisfactory Arrangements For Transcript, filed (vnm)
27—Motion For Extension of Time To File Transcript On Appeal, filed (vmm)
27—Order, filed and entered (vmm)

June 28—Transcript of Record, filed

Oct. 7—Affidavit of Daniel H. Friedman, filed
7—Exhibit to Affidavit of Daniel H. Friedman, filed
7—Motion to correct the record on appeal, filed

Oct. 14—Plaintiff's Response to Motion to Correct Record on Appeal and Conditional Motion, filed

1978

April 7—Mandate (affirmed), filed & entered

[1] **Complaint**

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

VS.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants.*

COMPLAINT

Plaintiffs bring this action for declaratory judgment pursuant to the New Mexico Declaratory Judgment Act, Chapter 340, Laws 1975, with respect to the constitutionality and validity of the Electrical Energy Tax Act, Chapter 263, Laws 1975, and for their complaint herein, state:

1. Arizona Public Service Company, an Arizona corporation, generates, transmits, distributes and sells electrical energy within the State of Arizona, and is regulated as a public service corporation by the Arizona Corporation Commission.

2. El Paso Electric Company, a Texas corporation, generates, transmits, distributes and sells electrical energy within the States of New Mexico and Texas, and is regulated as a public utility in New Mexico by the New Mexico Public Service Commission and in Texas by the cities of El Paso, Van Horn, Anthony and Clint.

3. Salt River Project Agricultural Improvement and Power District (hereinafter "Salt River Project"), a political subdivision of the State of Arizona, operating a federal

reclamation project pursuant to contracts with the Secretary of the Interior, generates, transmits, distributes and sells electrical energy within the State of Arizona.

4. Southern California Edison Company, a California corporation, generates, transmits, distributes and sells electrical energy within the State of California, and is regulated as a public utility by the California Public Utilities Commission.

5. Tucson Gas & Electric Company, an Arizona corporation, generates, transmits, distributes and sells electrical energy within the State of Arizona, and is regulated as a public service corporation by the Arizona Corporation Commission.

6. Fred O'Cheskey is Commissioner of the Bureau of Revenue of the State of New Mexico. The Bureau of Revenue is the agency of state government charged with the administration and enforcement of the Electrical Energy Tax Act.

7. The Four Corners Power Plant is an electrical generating station composed of five generating units and related facilities located on Indian lands leased from the Navajo Nation under Leases dated December 1, 1960 and July 1, 1966, duly approved by the Navajo Tribal Council and the Acting Secretary of the Interior.

8. Arizona Public Service Company owns and operates generating units Nos. 1, 2 and 3 at the Four Corners Power Plant. Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Southern California Edison Company and Tucson Gas & Electric Company each owns an undivided interest in generating units Nos. 4 and 5 at the Four Corners Power Plant.

9. The San Juan Generating Station is an electrical generating station composed of two generating units (one operational and one under construction) and related facili-

ties located in San Juan County, near Waterflow, New Mexico.

10. Public Service Company of New Mexico and Tucson Gas & Electric Company each owns an undivided one-half (½) interest in the San Juan Generating Station.

11. Certain of the plaintiffs (Arizona Public Service Company and El Paso Electric Company) sell electrical energy generated from the Four Corners Power Plant to a foreign country, Mexico.

12. As shown on the Map of Principal Transmission Lines annexed hereto as Exhibit "A", the electrical system of each plaintiff is directly interconnected with the system of each other plaintiff and with the electrical systems of Public Service Company of New Mexico, the U.S. Bureau of Reclamation, and Utah Power and Light Company. Southern California Edison Company's system is also directly connected with San Diego Gas & Electric Company, the Department of Water and Power, City of Los Angeles, the Pasadena Department of Water and Power, and Pacific Gas & Electric Company; its system is indirectly but substantially interconnected with the several Pacific Northwest systems and through them to other utility systems in the western United States. The interconnected transmission lines thus constitute an interstate grid encompassing the West.

13. As a consequence of the system interconnections described in the preceding paragraph, the demand for electricity in the major urban centers served by the plaintiffs in Arizona, southern California, and the El Paso area of West Texas determines in substantial degree the amount of electrical energy generated at generating stations located in New Mexico (as well as those in other states). The electrical energy generated in New Mexico in response to such demand to which each plaintiff is entitled from its generation facilities is instantaneously transmitted over existing transmission lines to that plaintiff's service area.

14. All of the plaintiffs' above-described transactions in the generation and transmission of electrical energy at the Four Corners Power Plant and the San Juan Generating Station, and the distribution and sales of such electrical energy, are in the course of commerce among the States and the Navajo Tribe of Indians, except for the aforesaid sales of electrical energy to Mexico, certain relatively insignificant sales made by Arizona Public Service Company within New Mexico to Utah International Inc., for operation of the Navajo Mine which provides the fuel for the Four Corners Power Plant, and for certain sales by El Paso Electric Company within its service area in the State of New Mexico. All other sales or exchanges of electrical energy in New Mexico by any plaintiff are wholesale sales to other electric utility companies on the interconnected systems in interstate commerce under the exclusive jurisdiction of the Federal Power Commission. Such interstate sales give rise to no New Mexico gross receipts tax liability under the New Mexico Gross Receipts and Compensating Tax Act.

15. Each plaintiff pays income, ad valorem, franchise and other taxes imposed by the State of New Mexico or its political subdivisions on it and other taxpayers similarly situated, and income, ad valorem, sales and use (or their equivalent), franchise, excise and other taxes imposed by the state of its incorporation on it and other taxpayers similarly situated.

16. Section 3 of the Electrical Energy Tax Act, Chapter 263, Laws 1975 (hereinafter the "Act"), purports to impose on persons generating electricity a privilege tax of four-tenths of one mill "on each net kilowatt hour of electricity generated in New Mexico" for the purpose of sale.

17. Subsection 9B of the Act provides that the electricial energy tax paid on electricity generated and consumed in New Mexico may be credited against the gross receipts tax due New Mexico. No credits of any type are provided with

respect to the electrical energy tax imposed upon electricity generated in New Mexico but transmitted and consumed outside New Mexico.

18. Subsection 9C of the Act directs that the credit for electrical energy tax paid on electricity generated and consumed in New Mexico shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and further requires the assignee of such credit to reimburse the assignor for the amount of the credit so assigned.

19. The practical operation and effect of Sections 3 and 9 of the Act is to tax the generation of electricity in New Mexico but shift the incidence of such tax to those who sell or consume that electricity outside New Mexico since the person generating and selling electricity for consumption in New Mexico receives either a credit (under Subsection 9B) against his gross receipts tax due New Mexico or a reimbursement (under Subsection 9C) in an amount equal to the electrical energy tax payable on such electricity.

20. Plaintiffs' retail sales of electrical energy transmitted from generating facilities in New Mexico to plaintiffs' respective service areas in Texas, Arizona and California are subject to certain taxes imposed by those states, or the political subdivisions thereof, or both. Such taxes are variously denominated as sales or other types of excise taxes, but are uniformly imposed upon, or passed on to consumers of electricity in those states.

21. There is no provision of law in Texas, Arizona or California whereby any of the plaintiffs are entitled to any credit, offset or rebate for the electrical energy tax imposed on them by New Mexico.

22. Public Service Company of New Mexico, an electric public utility regulated by the New Mexico Public Service Commission, with respect to its share of electrical energy

generated at the Four Corners Power Plant and the San Juan Generating Station, will in practical effect sustain no additional tax burden under the Electrical Energy Tax Act due to the provisions of Subsections 9B and 9C of the Act permitting the amount of electrical energy tax paid to be assigned or credited against its gross reecipts tax liability due the State of New Mexico.

23. El Paso Electric Company will in practical effect sustain no additional tax burden under the Electrical Energy Tax Act with respect to the electrical energy generated in New Mexico and sold by it to consumers in New Mexico due to the provisions of Subsections 9B and 9C of the Act allowing the electrical energy tax to be credited against its New Mexico gross receipts tax liability.

24. Plains Electric Generation and Transmission Cooperative, a New Mexico corporation, generates electrical energy at its generating plant near Algodones, New Mexico, and transmits and sells electrical energy solely to New Mexico electric utilities which are its members; however, by reason of Subsections 9B and 9C of the Act, it will incur no additional tax burden due to the Electrical Energy Tax Act.

25. Plaintiffs are informed and believe, and therefore allege, that no additional tax liability under the Electrical Energy Tax Act is incurred by any other person (as defined in the Electrical Energy Tax Act) engaged in the same business as plaintiffs upon electrical energy generated and consumed in New Mexico, due to the availability of the crediting provisions provided for under Subsections 9B and 9C of the Act.

26. Plaintiffs are informed and believe, and therefore allege, that all, or virtually all, of the additional taxes claimed to be due under the Electrical Energy Tax Act, after application of Subsections 9B and 9C of the Act, will be borne by those persons, including plaintiffs, engaged in

the generation of electricity in New Mexico which is transmitted across and consumed outside the boundaries of the State of New Mexico.

27. Plaintiffs are informed and believe, and therefore allege, that the Act was enacted for the purpose of and the view to placing the exclusive burden of paying additional tax revenues to the State of New Mexico upon transactions in commerce among the several states and with the Indian Tribes.

28. The language of the Act, coupled with the practical application of the tax, constitutes a tax on the privilege of engaging in commerce among the several states.

29. Plaintiffs contend that the Act is unconstitutional and void for each and every one of the following reasons:

A. The Electrical Energy Tax Act violates the Commerce Clause of Article I, Section 8 of the United States Constitution by deliberately and invidiously discriminating against and imposing direct and multiple burdens upon each plaintiff's interstate commerce in the transmission and sale of electricity.

B. Application of the Electrical Energy Tax to these plaintiffs, measured by electricity generated in New Mexico for transmission and sale in interstate commerce, is arbitrary, capricious and unreasonable and denies to each plaintiff the equal protection of the law, and the rights, privileges and immunities enjoyed by other members of the class defined as persons generating electrical energy in New Mexico, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution, and of Article II, Section 18, and Article IV, Section 26 of the New Mexico Constitution.

C. The Act deprives plaintiffs of property without due process of law in violation of Section 1 of the

Fourteenth Amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution.

D. The Act violates Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the United States Constitution.

30. Plaintiffs are informed and believe, and therefore allege, that defendants contend the Act is constitutional with respect to the matters set forth in paragraph No. 29 of this Complaint.

31. The plaintiffs, being persons whose rights, status or other legal relations are affected by the Act, request that the Court determine the questions of validity arising under the Act.

32. A genuine controversy exists between the plaintiffs and defendants with respect to the matters hereinbefore alleged; however, there is no controversy respecting the amount of the tax which would be payable by any plaintiff, if the Act is valid, nor with respect to the form or accuracy of any assessment of tax thereunder.

33. Due to the necessity to construe and apply provisions of the United States Constitution and the New Mexico Constitution in order to resolve the controversy between plaintiffs and defendants, plaintiffs have no other plain, speedy and adequate remedy.

34. All conditions precedent to the commencement and maintenance of this action have occurred or been met.

WHEREFORE, plaintiffs pray:

A. That this Court adjudge and declare the Electrical Energy Tax Act, Chapter 263, Laws 1975, to be unconstitutional and void.

B. That upon final hearing and determination the defendants be enjoined from enforcing the Electrical

Energy Tax Act and plaintiffs have such other and further relief as may be proper in the premises.

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/s/ By FRED C. HANNAHS

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Co-counsel for plaintiff,
El Paso Electric Company

Answers to Defendant Bureau of Revenue's Interrogatories

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

Interrogatory No. 1. Please give the citation for and popular name of the state tax statutes, other than New Mexico's, to which you are subject.

Answer to Interrogatory No. 1. See affidavits 1 through 5 attached to plaintiffs' Motion for Summary Judgment.

Interrogatory No. 2. Please identify all agreements, other than those referred to in the Stipulation of Facts proposed by your attorneys, currently in force between you and any other plaintiff or any other utility generating or selling electricity in New Mexico. If you will do so without a motion to produce, please attach a copy of each agreement to your answers.

Answer to Interrogatory No. 2.

Objected to.

Interrogatory No. 3. Please give the amounts of electricity generated outside New Mexico in 1975 which you sold to New Mexico utilities and identify the utilities.

Answer to Interrogatory No. 3.

ARIZONA PUBLIC SERVICE

Sold To	Generated Outside New Mexico	Generated in New Mexico	Total Sale
PSNM	1,585 Mwh	200 Mwh	1,785 Mwh
EPE Co.	3,075 Mwh	370 Mwh	3,445 Mwh

EL PASO ELECTRIC

Normally, all Kwh sold to other utilities in New Mexico are generated in New Mexico. However, available records for the last six months of 1975 indicate 180,000 Kwh generated in Texas were sold to PSNM. This should be regarded as an extraordinary transaction.

SALT RIVER PROJECT

None.

SOUTHERN CALIFORNIA EDISON

None.

TUCSON GAS & ELECTRIC

TG&E sold 30,000 Kwh to PSNM in 1975 from electricity generated outside New Mexico.

Interrogatory No. 4. Please list the amount of electricity generated in New Mexico purchased by you in each year since 1959.

Answer to Interrogatory No. 4.

Objected to. However, plaintiffs, without waiving their objections, will give the answer for the years 1970 through 1975 as the requested information is available.

ARIZONA PUBLIC SERVICE

Information is not available to make a direct answer to this question exactly as it is stated. Therefore, individual purchases by APS along with brief explanations are listed as follows:

A: Energy generated at San Juan, purchased from TGE

1973— 50,836 Mwh all generated in N.M.

1974—190,195 Mwh all generated in N.M.

B: Energy generated at Four Corners, purchased from SCE

1974— 8,186 Mwh all generated in N.M.

C: Economy Interchange purchased from PSNM

Total amounts purchased by APS are listed below. Most of this, but not all, was generated in New Mexico. A portion was bought from USBR by PSNM and re-sold to APS.

Year	1970	1971	1972	1973	1974	1975
	17,120	31,507	19,600	1,480	109,334	108,400

D: Economy Interchange purchased from EPE

Total amounts purchased by APS are listed below. Part of this was generated in New Mexico and part was generated in Texas.

Year	1970	1971	1972	1973	1974	1975
Mwh	0	0	2,423	1,395	6,083	7,259

E: Economy Interchange purchased from SRP and TGE

Total amounts purchased by APS are listed below. Most of this was generated in Arizona, but small portions were generated in New Mexico.

Year	1970	1971	1972	1973	1974	1975
SRP (Mwh)	55,560	59,652	33,893	1,515	815	7,444
TGE (Mwh)	2,201	10,798	14,808	8,461	4,908	11,716

EL PASO ELECTRIC

ELECTRICITY PURCHASED FROM OTHER UTILITIES BY EPEC*

	1970 KWH	1971 KWH	1972 KWH	1973 KWH	1974 KWH	1975 KWH
PNM	—0—	480,000	11,570,000	735,000	30,840,000	20,858,000
TGE	—0—	140,000	—0—	—0—	20,000	—0—
SRP	—0—	—0—	—0—	640,000	145,000	200,000
APS	—0—	—0—	5,152,000	4,615,000	4,130,000	2,710,000
CRSP	—0—	—0—	—0—	30,000	—0—	—0—
CPS	—0—	—0—	—0—	—0—	—0—	19,626,000
Total electricity purchased from other utilities by El Paso Electric Company	—0—	620,000	16,722,000	6,020,000	35,135,000	43,394,000

* KWH delivered to El Paso Electric Company at Four Corners Generating station in New Mexico; original source of generation unknown.

SALT RIVER PROJECT

1970—Four Corners #5 net test energy (accounted for as a purchase from the constructor, Bechtel Power Corporation)—SRP Portion	70,025,680 kwh
1971—Interchange from El Paso Electric	16.910,000 kwh
1972—Purchase from Plains Electric G & T	40,367,000 kwh
Economy Interchange from:	
El Paso Electric	72,797,000 kwh
Public Service of New Mexico	140,000 kwh
Southern California Edison	486,000 kwh
1972 Total	113,790,000 kwh
1973—Purchase from Plains Electric G & T	163,005,000 kwh
Interchange from El Paso Electric	840,000 kwh
Economy Energy from:	
El Paso Electric	30,518,000 kwh
Public Service of New Mexico	5,825,000 kwh
Tucson Gas & Electric	50,212,000 kwh
1973 Total	250,400,000 kwh
1974—Purchase from:	
El Paso Electric	14,483,000 kwh
Plains Electric G & T	228,156,000 kwh
Public Service of New Mexico	98,631,000 kwh
Tucson Gas & Electric	179,604,000 kwh
Interchange from El Paso Electric	289,000 kwh
1974 Total	521,163,000 kwh
1975—Purchase from:	
El Paso Electric	18,766,000 kwh
Plains Electric G & T	32,689,000 kwh
Public Service of New Mexico	94,735,000 kwh
Tucson Gas & Electric	5,465,000 kwh
1975 Total	151,655,000 kwh

SOUTHERN CALIFORNIA EDISON

Energy generated in New Mexico and purchased by SCE:

Year	MWH
1959 through 1968	0
1969	6,652
1970	21,165
1971	104,721
1972	2,650
1973	40,567
1974	46,422
1975	181,467

Energy purchases listed above include the total purchased by SCE from Four Corners Project participants. Our records do not include the necessary data to determine what portion of the energy was generated in New Mexico.

TUCSON GAS & ELECTRIC

No purchases by TGE 1970 and 1971

1972	80,000 KWH
1973	40,000 KWH
1974	1,892,000 KWH
1975	73,619,000 KWH

Interrogatory No. 5. Please list the amount of electricity you generated in New Mexico and sold outside New Mexico in each year since 1959.

Answer to Interrogatory No. 5.

Objected to. However, plaintiffs, without waiving their objections, answer the question for the years 1970 through 1975 as the information is available.

ARIZONA PUBLIC SERVICE

In year 1975 the amount generated in New Mexico and sold outside by APS was 3,984,947 Mwh.

However, information is not available to make a direct answer for years preceding 1975, for the following reasons:

A. There were sales of economy interchange energy by APS to PSNM and EPE during these years.

B. These interchange sales are made hour-by-hour from whatever generators may be available.

C. Hourly billing calculations are made automatically by computer which provides the total amount sold and the cost of generation. This is a composite mixture of power from several different generators.

D. Due to prohibitive volumes of records, details of these calculations were not recorded. Only the composite totals were retained.

E. A portion of the electricity generated by APS in New Mexico is included in these interchange sales to PSNM and EPE. It is not known what the quantity of this portion is.

F. The following tabulation shows the known quantities and indicates where information is not available.

Year	1970	1971	1972	1973	1974	1975
APS Generation in N.M. Mwh	4,782,740	4,921,675	4,215,885	4,889,150	4,592,828	4,277,980
Less Portions Sold in N.M.:						
NTUA Firm	98,552	142,016	199,961	211,596	244,476	253,622
Utah Mining	23,109	27,508	28,661	29,891	34,603	38,841
PSNM Interchange	•	•	•	•	•	200
EPE Interchange	•	•	•	•	•	370
Remainder Sold Outside N.M.	•	•	•	•	•	3,984,947

• Indicates information not available.

EL PASO ELECTRIC
Generated by EPEC in New Mexico at

	1970	1971	1972	1973	1974	1975
Four Corners	475,054	597,062	688,613	669,261	591,231	457,593
Rio Grande	596,199	561,139	968,465	1,045,608	1,024,211	1,102,932
Total Gen. in N.M. by EPEC	1,071,253	1,158,201	1,657,078	1,714,869	1,615,442	1,560,525
Sold in New Mexico						
Retail	452,238	470,315	492,026	517,217	514,108	524,808
CPS (Almogordo)	78,553	81,246	93,813	101,953	106,532	105,317
Total Retail & CPS in N.M.	530,791	551,561	585,839	619,170	620,640	630,125
Sold in New Mexico						
Wholesale PNM	—0—	24,597	50,030	153,859	29,168	60
CPS (Lordsburg)	—0—	—0—	—0—	1,059	—0—	—0—
Total Wholesale in N.M.	—0—	24,597	50,030	154,918	29,168	60
Total Generated & Sold Outside New Mexico •	540,461	582,044	1,021,210	940,782	965,634	930,340

• Includes principally electricity for Company's customers in Texas, and for International Export to Republic of Mexico; also included are amounts sold to other utilities, delivered at Four Corners, New Mexico for ultimate consumption outside of New Mexico. Given in MWH.

SALT RIVER PROJECT

1970—SRP Portion—Four Corners #4 and #5 Generation		614,628,320 kwh
Four Corners Unit Tripping Interchange to Arizona Public Service ("APS")	3,755,000	
Four Corners Unit Tripping Interchange, Over-schedule payback from APS	– 711,000	
		– 3,044,000 kwh
1970 Net		611.584.320 kwh
		856,714,000 kwh
1971—SPR—Four Corners #4 and #5		
Four Corners Unit Tripping Interchange to APS		– 50,000 kwh
1971 Net		856.664,000 kwh
		983,937,000 kwh
1972—SRP—Four Corners #4 and #5		
Economy Energy to El Paso Electric		– 400,000 kwh
1972 Net		983.537,000 kwh
		956,236,000 kwh
1973—SRP—Four Corners #4 and #5		
Interchange to:		
El Paso Electric	730,000	
Public Service of New Mexico	20,000	
Economy Energy to:		
El Paso Electric	640,000	
Tucson Gas & Electric	40,000	
		– 1,430,000 kwh
1973 Net		954.806.000 kwh
		845,355,000 kwh
1974—SRP—Four Corners #4 and #5		
Interchange to El Paso Electric	253,000	
Sale to El Paso Electric	345,000	
		– 598,000 kwh
1974 Net		844,757,000 kwh
		653,048,000 kwh
1975—SRP—Four Corners #4 and #5		
Sale to:		
El Paso Electric	200,000	
Public Service of New Mexico	320,000	
Tucson Gas & Electric	2,216,000	
		– 2,736,000 kwh
1975 Net		650,312,000 kwh

SOUTHERN CALIFORNIA EDISON

Energy generated by SCE in New Mexico and sold outside New Mexico:

Year	MWH
1959 through 1968	0
1969	474,144
1970	3,249,643
1971	4,098,885
1972	4,720,66[illegible]
1973	4,576,297
1974	4,054,820
1975	3,134,110

TUCSON GAS & ELECTRIC

Year	1970	1971	1972	1973	1974	1975
Generated in N. M.	473,518	597,538	688,860	941,616	1,765,999	1,673,588
Sold to Utilities	—0—	2,639	2,368	201,088	713,450	66,925
Sold to TGE Customers	473,518	594,899	686,492	707,150	956,952	1,605,138
Total Sales	473,518	597,538	688,860	908,238	1,670,402	1,672,063

Above energy figures are in MWH.

Interrogatory No. 6. Please list each power plant you owned during the period from 1960 to the present, and for each plant please state where it is located, its capacity in megawatts, when its was placed in service, whether it is still in service, its actual output each year, the type of plant (e.g., steam, or internal combustion, or hydroelectric, etc.) and the kind of fuel it used.

Answer to Interrogatory No. 6.

Objected to. However, as each of the plaintiffs in this action are, or were at one time, participants in the Palo

Verde Nuclear Generating Station the information requested in this interrogatory was gathered in a slightly different form and supplied to answers to interrogatories in the Nuclear Regulatory Commission proceedings regarding PVNGS. That information is attached to these answers for defendant's use. However, plaintiffs do not waive their objections to this interrogatory by volunteering this information.

Interrogatory No. 7. Please identify each agreement under which coal has been or is being purchased for burning in the Four Corners Plant or the San Juan Plant. If you will do so without a motion to produce, please attach a copy of the agreement to your answers.

Answer to Interrogatory No. 7.

Objected to.

Interrogatory No. 8. Please identify any planning studies or any other similar reports or documents prepared by you or a consultant that deal in any way with the feasibility or desirability of constructing the Four Corners Plant or the San Juan Plant in New Mexico. If you will do so without a motion to produce, please attach a copy of the document to your answers.

Answer to Interrogatory No. 8.

Objected to.

Interrogatory No. 9. Please identify each person whom you expect to call as a witness at the trial of this case and state the subject matter upon which he or she is expected to testify.

Answer to Interrogatory No. 9.

Fred O'Chesky

Einer Greve

Henry Sergeant

Martin Kuric

C. M. Perkins

Phoebe Fornaciari

Carl Turner

A. C. Maxwell

Stan Bizant

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

BRUCE NORTON, being first duly sworn, upon oath states that he is one of the attorneys for plaintiffs in the above entitled cause; that all of said plaintiffs maintain their offices outside the State of New Mexico wherein this cause is pending, and Affiant makes this verification on behalf of each of said plaintiffs; that he has read and knows and understands the matters and things stated in the foregoing Answers to Defendant Bureau of Revenue's Interrogatories and that the same are true according to his information and belief.

/s/ BRUCE NORTON
Bruce Norton

SUBSCRIBED and sworn to before me this 14th day of September, 1976.

/s/ DOROTHY B. LOPE
Notary Public

My commission expires: 6-1-80.

I certify that I mailed a copy of the foregoing pleading to opposing counsel of record on 9-14-76.

/s/ RICHARD L. CARPENTER

Plaintiffs' Motion for Summary Judgment

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

Filed September 15, 1978

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiffs, by and through their attorneys, and, pursuant to Rule 56, N.M.R.C.P., move for summary judgment in their favor on all issues raised by the Complaint herein.

In support thereof, movants state that annexed hereto and incorporated herein by reference are supporting affidavits, being Affidavit Nos. 1-7, inclusive, and that the pleadings and answers to interrogatories on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the movants are entitled to judgment as a matter of law.

WHEREFORE, plaintiffs pray that the Court enter its order rendering them summary judgment on the issues raised by their Complaint.

Respectfully submitted,
FRANK ANDREWS, III, ESQ.
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3100 Valley Center
Phoenix, Arizona 85073

/s/ By BRUCE NORTON, ESQ.
Bruce Norton, Esq.
BIGBEE, STEPHENSON, CARPENTER & CROUT

/s/ By RICHARD N. CARPENTER
Richard N. Carpenter, Esq.
Attorneys for Plaintiffs

I certify That I mailed a copy of the foregoing pleading to opposing counsel of record on 9/18/76

/s/ RICHARD N. CARPENTER

Affidavit of Henry B. Sargent, Jr.
(Affidavit No. 1 to Plaintiffs' Motion for Summary Judgement)

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

STATE OF ARIZONA)
) ss.
County of)

HENRY B. SARGENT, JR., being first duly sworn, upon his oath, deposes and says:

1. That he is the Vice President and Treasurer of ARIZONA PUBLIC SERVICE COMPANY and as such he is authorized to make this Affidavit, and that statements herein are made upon his personal knowledge and belief.

2. The plaintiffs in this proceeding are Arizona Public Service Company (APS), Tucson Gas & Electric Company (TGE), Salt River Project Agricultural Improvement and Power District (SRP), Southern California Edison Company (Edison), and El Paso Electric Company (EPE).

3. APS is an Arizona corporation with its principal office in Phoenix, Arizona, and as a public service corporation APS is regulated by the Arizona Corporation Commission.

4. APS distributes electricity at retail in Arizona over an area which encompasses approximately 50,335 square miles and an estimated population of 1,065,000.

5. As of December 31, 1974, the aggregate generating capability of APS's facilities was 2,143.4 megawatts of rated capacity, of which 812 megawatts of rated capacity or 37.9% is generated in New Mexico.

6. The Four Corners Power Plant is situated on lands leased from the Navajo Tribe of Indians, wholly within the Navajo Indian Reservation. Units 1, 2 and 3 of the Four Corners Power Plant are owned entirely by APS. Units 4 and 5 of the Four Corners Power Plant are owned by the following utilities as co-tenants with their undivided interests set opposite their respective names:

Southern California Edison Company	48%
Arizona Public Service Company	15%
Public Service Company of New Mexico	13%
Salt River Project Agricultural Improvement and Power District	10%
Tucson Gas and Electric Company	7%
El Paso Electric Company	7%

APS operates Units 4 and 5 as agent for the other co-tenants. As defined in an Operating Agreement and a Co-Tenancy Agreement among the co-owners, each co-tenant is entitled to its respective percentage of the generating capacity entitlement. Whenever any co-tenant directs the generation of energy from either Unit, the other co-tenants are required to operate same at minimum load. The co-tenants share costs and expenses according to their respective percentages as provided in these agreements.

7. For 1975, APS paid or became liable for the following New Mexico taxes:

Apportioned Corporate Income	Ad Valorem Taxes San Juan	Ad Valorem Taxes M. Kinley
$54,506	$791,583	$ 1,373

Corporate Franchise	Gross Receipts	Compensating	Unemployment	Excise
$25,720	$25,459(1)	$225,539(2)	$25,713(3)	$87,814

(1) Applicable to energy supplied to Utah International, Inc. for production of coal for Four Corners Power Plant. The tax paid constitutes an operating expense chargeable to co-owners in accordance with agreements.

(2) Applicable to purchase of property for Four Corners Power Plant and chargeable to co-owners in accordance with agreements.

(3) Applicable to payrolls at Four Corners Plant Station and chargeable to co-owners in accordance with agreements.

Similar New Mexico tax liabilities apply for 1976 and are reasonably expected for later years.

8. As shown on the Map of Principal Transmission Lines annexed to the Complaint and attached hereto as Exhibit A, the APS electrical system is directly or indirectly interconnected with the electrical system of each other plaintiff in this cause, and either directly or indirectly interconnected with the electrical systems of Public Service Company of New Mexico (PNM), United States Bureau of Reclamation (USBR), and Utah Power & Light Company (Utah P&L). The interconnecting transmission lines constitute an interstate grid encompassing the entire western United States and portions of Canada and the Republic of Mexico.

9. Deliveries of energy at the Four Corners and San Juan Generating Stations are made through switchyard facilities schematically represented on Exhibit B annexed hereto. Transmission paths to the load centers of each plaintiff are represented on Exhibit C. APS' entitlement at Four Corners (or energy purchased from others at Four Corners) is transmitted to its load centers over transmission facilities owned by APS and USBR.

10. As a consequence of the system interconnections described in Paragraph Eight, the demand for electricity in the major urban centers served by plaintiffs in Arizona, southern California, and the El Paso area of West Texas determines in substantial degree the amount of electrical energy generated at the plaintiffs' generating stations located in New Mexico (as well as those in other states). The electrical energy generated in New Mexico in response to such demand, to which each plaintiff is entitled according to its respective ownership of the generation facilities, is transformed and instantaneously transmitted at the speed of light, along existing transmission lines to that plaintiff's service area.

11. Before it can be transmitted to market areas within or without New Mexico, electrical energy generated in New Mexico must be transformed as shown on Exhibit B and allocated by switchyard facilities to the transmission lines shown on Exhibit C, which serve particular markets. Before such transformation and allocation, the market in which energy will be distributed cannot be identified.

Exhibit B. Exhibit B shows schematically the relation between generation, transformation, and transmission at the Four Corners and San Juan Generating Stations. At Four Corners, energy is generated on Units 1, 2 and 3 (wholly-owned by APS) at 20 kilovolts and at 22 kv on Units 4 and 5. After generation, the voltage of the energy must be increased by transformers (shown as wavy lines on Exhibit B) to the voltages required by the various trans-

mission lines. Transformers change voltage by electromagnetic induction, producing an induced current at higher or lower voltage, which is then allocated to particular transmission lines through the switchyard facilities. At Four Corners, energy generated on Unit 5 at 22 kv is transformed to 500 kv for delivery at the bus tie to APS' 500 kv transmission line and thence to Edison's service areas in California; energy generated on Unit 4 at 22 kv is transformed to 345 kv for delivery at the bus ties to APS', UPL's, and PNM's transmission lines; and energy generated on Units 1, 2 and 3 at 20 kv is transformed to 230 kv for delivery at the bus tie to PNM's and USBR's transmission lines and is again transformed to 345 kv for delivery through the 345 kv bus. The transformers between bus bars shown on Exhibit B both "step up" and "step down" the voltages of the energy, which "flows" in either direction between buses at different times. No one generator on the interconnected system serves a particular transmission line.

Exhibit C. Exhibit C shows schematically the transmission paths from New Mexico generating stations to relevant markets. All energy delivered to APS at the 500 kv Four Corners bus is transmitted to Edison's service areas in California; energy delivered to APS' transmission lines at the 345 kv Four Corners bus is transmitted to the APS and TGE service areas in Arizona; and all energy delivered to TGE's transmission line at the 345 kv San Juan bus is transmitted to its service areas. Energy delivered to PNM at the Four Corners 345 kv and 230 kv buses, or at the San Juan 345 kv bus, is available both for transmission to EPE's kv line interconnected at PNM's West Mesa substation near Albuquerque, and for wholesale sale or retail distribution to PNM's New Mexico customers. Energy delivered at the Four Corners 230 kv bus to the USBR is available both for transmission of SRP's entitlement at Four Corners to its service areas in Arizona and

for delivery to rural cooperatives which transmit and distribute electricity in New Mexico.

12. In 1975, APS sold 254,087,410 kwh to the Navajo Tribal Utility Authority (NTUA). Of this energy sold, 5,309,183 kwh or 2% was delivered at Indian Wells and White Cane in Arizona and 248,778,227 kwh or 98% was delivered in New Mexico.

13. Electrical energy required for operation of the Navajo mine which provides fuel for the Four Corners Power Plant is sold to Utah International, Inc. by APS. The New Mexico Electrical Energy Tax, as measured by energy sold at retail to Utah International, Inc. is entirely offset by the credit under § 9B. That is, APS' 1975 electrical energy tax liability of $15,536.40 upon sales of 30,841,000 kwh at retail to Utah International, Inc. would be recouped by the § 9B credit against APS' 1975 New Mexico gross receipts tax liability of $25,459.00.

14. The plaintiffs, as co-tenants of the Four Corners Power Plant, have made agreements for economy and emergency sales of energy. A "Six Party Economy Energy Agreement" provides for voluntary sales of energy when available energy of the interconnected systems can be purchased more economically than employing additional generators on the buyer's system, and "Principles of Interconnected Operation," and a "Unit Tripping Agreement" provide for emergency services as required by a co-tenant. Also, APS has individual contracts with PNM providing for purchases and sales of economy and emergency energy and with TGE for purchase of contingent power and energy from San Juan. The point of delivery for energy supplied under those agreements is ordinarily agreed upon between the parties. Where the switchyards at the Four Corners Power Plant are the only points of interconnection between the parties' systems, deliveries are necessarily made in New Mexico. All such sales of energy are wholesale sales in interstate commerce over which the Federal

Power Commission has exclusive jurisdiction (except in the case of SRP which is not subject to such jurisdiction). The agreements referred to above have been filed as tariffs with the FPC on behalf of each of the plaintiffs, except SRP.

15. 1975 wholesale sales and transfers made by APS in accordance with the agreements described in the preceding paragraph, are set forth in the following table:

	TGE	SRP	Edison	PNM	EPE
Delivered	795,000	—0—	59,385,000	1,785,000	3,445,000
Received	5,898,000	—0—	1,361,000	108,400,000	7,466,000

In 1975 APS delivered 253,621,603 kwh to the Navajo Tribal Authority (NUTA), an enterprise of the Navajo Nation, for distribution and resale on the Navajo Indian Reservation. During 1975 APS also delivered 6,670,000 kwh to, and received 456,217,000 kwh from, Utah Power & Light Company.

The Electrical Energy Tax measured by the energy sold at wholesale after July 1, 1975, is passed on by each plaintiff in whole or in part to the wholesale purchaser. Where the eventual wholesale purchaser is a "person selling the electricity for consumption in New Mexico", § 9C of the Electrical Energy Tax Act requires the purchaser to reimburse the wholesaler for the amount of the credit accorded the ultimate retailer by § 9B, and § 9C also requires that such credit be assigned by the wholesaler to its purchaser. Regulations issued under those provisions require each generating wholesaler to assign a "potential credit" equal to the Electrical Energy Tax to his wholesale purchaser, who is entitled to an actual credit against the gross receipts tax if the electrical energy is sold "for consumption in New Mexico."

16. On September 25, 1975, APS timely filed with defendant a return (Form EE-1) showing that for July, 1975, energy generated by APS in New Mexico was 417,874,000 kwh, and the amount due under the Electrical Energy Tax

for such period was $167,149.60. The amount of tax shown on the returns was duly protested without payment in accordance with § 72-13-38 N.M.S.A., 1953. The tax for subsequent months has been similarly returned and the unpaid portion has been timely protested by APS.

17. APS is subject to the following Arizona taxes and in 1975 paid or became liable for the amounts shown:

Corporate Income	Unemployment	State Sales	City Sales	State Use
$1,515,687	$87,317	$12,315,992	$1,193,116	$769,502

City Use	Ad Valorem	City Franchise	Excise and Other
$63,355	$35,762,052	$3,629,957	$779,760

TOTAL: $56,116,738

Similar liabilities apply for 1976 and are reasonably expected for later years.

Electrical energy generated in New Mexico, in respect of which the Electrical Energy Tax is payable, is sold by APS at retail to consumers in Arizona subject to the state and city taxes shown above. There is no provision of Arizona law under which APS is entitled to any credit, offset, rebate or other form of recoupment for the Electrical Energy Tax paid in respect of such energy.

/s/ HENRY B. SARGENT, JR.
Henry B. Sargent, Jr.

SUBSCRIBED AND SWORN to before me this 10th day of September, 1976.

/s/ MARY F. TRENBERTH
Notary Public

My commission expires: Nov. 9, 1978.

Affidavit of Martin P. Kuric
(Affidavit No. 2 to Plaintiffs' Motion for Summary Judgement)

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

STATE OF TEXAS)
) ss.
County of El Paso)

MARTIN P. KURIC, being first duly sworn, upon his oath, deposes and says:

1. That he is the Vice President of EL PASO ELECTRIC COMPANY, and as such is authorized to make this Affidavit, and that statements herein are made upon his personal knowledge and belief.

2. The plaintiffs in this proceeding are Arizona Public Service Company (APS), Tucson Gas & Electric Company (TGE), Salt River Project Agricultural Improvement and Power District (SRP), Southern California Edison Company (Edsion), and El Paso Electric Company (EPE).

3. EPE is a Texas corporation and is regulated as a public utility in New Mexico by the Public Service Commission and in Texas by the cities of El Paso, Van Horn, Anthony and Clint.

4. EPE distributes electricity at retail in south central New Mexico and metropolitan El Paso, over 10,000 square miles and to an estimated population of 495,000.

5. The aggregate generating capability of EPE facilities is 999 megawatts of rated capacity, of which 489 megawatts of rated capacity or 48.9% is generated in New Mexico.

6. EPE owns and operates the Rio Grande Generating Station near Anapra, New Mexico. The Four Corners Power Plant Units 4 and 5 are owned by the plaintiffs as co-tenants with EPE having a 7% undivided interest (112 megawatts).

7. For 1975, EPA paid or became liable for the following New Mexico taxes:

	Ad Valorem Taxes				
	Otero	Sierra	Bernalillo	Luna	Valencia
	$ 18,525.47	$12,711.23	$11,986.00	$1,936.18	$ 5,706.26

Apportioned Corporate Income	San Juan	Socorro		Elephant Butte Irrigation Dist.	Dona Ana
$122,985.77	$ 70,974.20	$18,798.10		$ 132.09	$531,637.78

Corporate Franchise	Gross Receipts	Compensating	Unemployment
$ 12,441.55	$404,582.86	$35,796.40	$11,144.57

(1) Applicable to energy supplied to Utah International, Inc. for production of coal for Four Corners Power Plant. The tax paid constitutes an operating expense chargeable to co-owners in accordance with agreements.

(2) Applicable to purchase of property for Four Corners Power Plant and chargeable to co-owners in accordance with agreements.

(3) Applicable to payrolls at Four Corners Plant Section and chargeable to co-owners in accordance with agreements.

Similar New Mexico tax liabilities apply for 1976 and are reasonably expected for later years.

8. As shown on the Map of Principal Transmission Lines annexed to the Complaint and attached hereto as Exhibit A, the EPE electrical system is directly interconnected with the electrical system of each other plaintiff in this cause, and either directly or indirectly interconnected with the electrical systems of Public Service Company of New Mexico (PNM), United States Bureau of Reclamation (USBR), and Utah Power & Light Company (Utah P&L). The interconnecting transmission lines constitute an interstate grid encompassing the entire Western United States and portions of Canada and the Republic of Mexico.

9. Deliveries of energy at the Four Corners and San Juan Generating Stations are made through switchyard facilities schematically represented on Exhibit B annexed hereto. Transmission paths to the load centers of each plaintiff are represented on Exhibit C. EPE's entitlement at Four Corners is transmitted over PNM's 345 kv lines to its West Mesa Substation near Albuquerque, thence over EPE's 345 kv transmission lines to its service areas in southern New Mexico and the El Paso Metropolitan area.

10. Before it can be transmitted to market areas within or without New Mexico, electrical energy generated in New Mexico must be transformed as shown on Exhibit B and allocated by switchyard facilities to the transmission lines shown on Exhibit C, which serve particular markets. Before such transformation and allocation, the market in which energy will be distributed cannot be identified.

Exhibit B. Exhibit B shows schematically the relation between generation, transformation, and transmission at the Four Corners and San Juan Generating Stations. At Four Corners, energy is generated at 22 kv on Units 4 and 5. At EPE's Rio Grande Station, energy is generated at 14 kv. After generation, at these stations, the voltage of the energy must be increased by transformers (shown as wavy lines on Exhibit B) to the voltages required by the various transmission lines. Transformers change voltage by electro-

magnetic induction, producing an induced current at higher or lower voltage, which is then allocated to particular transmission lines through the switchyard facilities. At Four Corners, energy generated on Unit 4 at 22 kv is transformed to 345 kv for delivery at the bus ties to APS's and PNM's transmission lines; and energy generated on Units 1, 2 and 3 at 20 kv is transformed to 230 kv for delivery at the bus tie to PNM's and USBR's transmission lines and is again transformed to 345 kv for delivery through the 345 kv bus. The transformers between bus bars shown on Exhibit B both "step up" and "step down" the voltages of the energy, which "flows" in either direction between buses at different times. No one generator on the interconnected system serves a particular transmission line.

Exhibit C. Exhibit C shows schematically the transmission paths from New Mexico generating stations to relevant markets. Energy delivered to PNM at the Four Corners 345 kv and 230 kv buses, or at the San Juan 345 kv bus, is available both for transmission to EPE's 345 kv line interconnected at PNM's West Mesa substation at Albuquerque, and for wholesale sale or retail distribution to PNM's New Mexico customers.

11. EPE distributes electricity as a public utility at retail in New Mexico, serving an area in south central New Mexico. The Electrical Energy Tax measured by electricity sold by EPE at retail in New Mexico will be fully offset by gross receipts tax credits under § 9B of the Electrical Energy Tax Act (the Act), while the tax measured by electricity transmitted to EPE's service area in Texas and to the U.S.-Mexican border for export will not be offset by and credit.

12. The plaintiffs, as co-tenants of the Four Corners Power Plant, have made agreements for economy and emergency sales of energy. A "Six Party Economy Energy Agreement'' provides for voluntary sales of energy when available energy of the interconnected systems can be pur-

chased more economically than employing additional generators on the buyer's system, and "Principles of Interconnected Operation", and a "Unit Tripping Agreement" provide for emergency services as required by a co-tenant. The point of delivery for energy supplies under those agreements is ordinarily agreed upon between the parties. Where the switchyards at the Four Corners Power Plant are the only points of interconnection between the parties' systems, deliveries are necessarily made in New Mexico. All such sales of energy are wholesale sales in interstate commerce over which the Federal Power Commission has exclusive jurisdiction (except in the case of SRP which is not subject to such jurisdiction). The agreements referred to above have been filed as tariffs with the FPC on behalf of each of the plaintiffs, except SRP.

13. 1975 wholesale sales and transfers made by EPE in 1974 to plaintiffs in accordance with the agreements described in the preceding paragraph, are set forth in the following table:

	APS	TGE	SRP	Edison	PNM
Delivered	6,524,000	2,207,000	18,766,000	—0—	60,000
Received	2,710,000	—0—	200,000	—0—	20,858,000

The Electrical Energy Tax measured by the energy sold at wholesale after July 1, 1975, is passed on by each plaintiff in whole or in part to the wholesaler purchaser. Where the eventual wholesale purchaser is a "person selling the electricity for consumption in New Mexico", § 9C of the Act requires the purchaser to reimburse the wholesaler for the amount of the credit accorded the ultimate retailer by § 9B, and § 9C also requires that such credit be assigned by the wholesaler to its purchaser. Regulations issued under those provisions required each generating wholesaler to assign a "potential credit" equal to the Electrical Energy Tax to his wholesale purchaser, who is entitled to an actual

credit against the gross receipts tax if the electrical energy is sold "for consumption in New Mexico."

14. On September 25, 1975, EPE timely filed with defendant a return (Form EE-1) showing that for July, 1975, energy generated by EPE in New Mexico was 155,314,000 kwh, and the amount due under the Electrical Energy Tax for such period was $62,126.00. Because EPE is entitled to recover the Electrical Energy Tax on energy sold by it to New Mexico consumers by credit under § 9B of the Act, since 60,593,248 kwh of EPE's energy generated in New Mexico was consumed in New Mexico, EPE paid $24,237.30 of the total tax, leaving an unpaid balance of $37,806.70. That balance was duly protested by EPE without payment in accordance with § 72-13-38 N.M.S.A., 1953. The tax for subsequent months has been similarly returned and the unpaid portion has been timely protested by EPE.

15. EPE is subject to the following Texas and municipal taxes and in 1975 became liable for the amounts shown below:

State Ad Valorem	$ 750,191.53
City Ad Valorem	1,138,272.23
City Occupation	893,888.44
Gross Receipts	1,139,942.88
Compensating	24,464.66
Corporate Franchise	135,694.00
Unemployment	2,208.37

Similar liabilities apply for 1976 and are reasonably expected for later years.

Electrical energy generated in New Mexico in respect of which the Electrical Energy Tax is payable, is sold by EPE at retail to consumers in Texas, subject to the gross receipts taxes shown above. There is no provision of Texas

law under which EPE is entitled to any credit, offset, rebate or other form of recoupment for the Electrical Energy Tax paid in respect of such energy.

16. The practical application of the Electrical Energy is illustrated by the following information showing its impact upon EPE. The figures shown are based upon the actual experiences of EPE for July 1, 1975 (the effective date of the Electrical Energy Tax) through March, 1976.

EL PASO ELECTRIC COMPANY
NEW MEXICO ELECTRICAL ENERGY TAX
ANALYSIS OF SYSTEM INPUT

JULY, 1975 THRU MARCH, 1976

Schedule 1

LINE NO.	SOURCE OF INPUT	MWH	
	GENERATION IN NEW MEXICO		
	By El Paso Electric Company		
1	At Four Corners	437,701.000	
2	At Rio Grande	762,053.000	
	Total Generation in New Mexico		
3	By El Paso Electric Company		1,199,754.000
	GENERATION IN NEW MEXICO		
	By Other Utilities and Purchased By El Paso Electric Company		
4	PNM	11,552.000	
5	CPS	9,645.000	
	Total Generation in New Mexico		
6	By Others		21,197.000
7	Total Generation in New Mexico		1,220,951.000
	GENERATION ELSEWHERE		
8	By El Paso Electric Company in Texas	1,397,477.000	
	By Other Utilities and Purchased by El Paso Electric Company		
9	PNM	5,043.000	
10	UPL	11,790.000	
11	APS	315.000	
12	SRP	200.000	
13	Total Generation Elsewhere		1,414,825.000
14	TOTAL SYSTEM INPUT		2,635,776.000

EL PASO ELECTRIC COMPANY
NEW MEXICO ELECTRICAL ENERGY TAX
ANALYSIS OF SYSTEM SALES

JULY, 1975 THRU MARCH, 1976

Schedule 2

LINE NO.		MWH	
	GENERATED AND SOLD IN NEW MEXICO		
1	To El Paso Electric Co. Retail Customers		394,743.728
	TO WHOLESALE CUSTOMERS		
2	PNM	4,339.000	
3	APS	6,037.000	
4	CPS	80,540.000	
5	RG CO-OP (DELL CITY, N.M.)	3,196.439	
6	TGE	270.000	
7	SRP	550.000	
8	TOTAL GENERATED BUT SOLD IN NEW MEXICO TO WHOLESALE CUSTOMERS		92,932.439
9	NOT GENERATED BUT SOLD IN NEW MEXICO TO EL PASO ELECTRIC CO. RETAIL CUSTOMERS		4,755.074
	TO WHOLESALE CUSTOMERS		
10	PNM	200.000	
11	SRP	250.000	
12	APS	857.000	
13	TOTAL NOT GENERATED BUT SOLD IN NEW MEXICO TO WHOLESALE CUSTOMERS		1,307.000
14	TOTAL SALES IN NEW MEXICO		495,738.241
	SOLD IN TEXAS		
15	TO EL PASO ELECTRIC CO. RETAIL CUSTOMERS		1,709,272.075
	TO WHOLESALE CUSTOMERS		
16	RG CO-OP—Dell City, Texas	20,371.561	
17	RG CO-OP—Van Horn	6,304.800	
18	TOTAL WHOLESALE SOLD IN TEXAS		26,676.361
19	TOTAL SALES IN TEXAS		1,735,948.436
20	SOLD AT INTERNATIONAL BORDER (MEXICO)		240,840.000
21	TOTAL MWH SALES		2,472,526.677

EL PASO ELECTRIC COMPANY
NEW MEXICO ELECTRICAL ENERGY TAX
ELECTRICAL ENERGY TAXES BORNE
BY EL PASO ELECTRIC COMPANY

Schedule 3

LINE NO.		MWH	Generation Tax
	TAX BASED ON EL PASO ELECTRIC COMPANY GENERATION		
1	Total Generation by El Paso Electric Company in New Mexico	1,199,754.000	$479,901.60
	TAX BASED ON GENERATION BY OTHER UTILITIES; CREDIT ASSIGNED TO EL PASO ELECTRIC COMPANY; EL PASO ELECTRIC COMPANY TO REIMBURSE ASSIGNOR		
	Assignor		
2	PNM	*11,552.000	2,436.40
3	CPS	9,645.000	3,858.00
4	Total Electrical Taxes Borne By El Paso Electric Company	1,220,951.000	$486,196.00

* Analysis

	MWH	Gen. Tax at .4 Mills
½ Tax	10,922.000	$2,184.40
Full Tax	630.000	252.00
TOTAL	11,552.000	$2,436.40

Schedule 4

EL PASO ELECTRIC COMPANY
NEW MEXICO ELECTRICAL ENERGY TAX
RECOVERY OF TAXES BORNE BY EL PASO ELECTRIC COMPANY
JULY, 1975 THRU MARCH, 1976

LINE No.		MWH Sales	MWH Generation	Energy Tax at 0.4 Mills	Recovery: Credit To El Paso Electric Gr. Rec. Tax	Recovery: Credit Assigned To Other	Recovery: Recovered Elsewhere (Tex., Etc.)
	SALES GENERATED AND SOLD IN NEW MEXICO BY EL PASO ELECTRIC CO.	COL. A	COL. B	COL. C	COL. D	COL. E	COL. F
1	Retail Sales	394,743.728	421,395.799	$166,373.92	$166,373.92	$	$
	Wholesale Sales						
2	PNM	4,339.000	4,339.000	1,735.60	223.40	1,512.20	
3	APS	6,037.000	6,037.000	2,414.80		1,227.20	1,187.60
4	CPS	80,540.000	83,761.600	33,504.64		33,504.64	
5	RG CO-OP (Dell City, N.M.)	3,196.439	3,516.085	1,406.44		1,406.44	
6	TGE	270.000	270.000	108.00		54.00	54.00
7	SRP	550.000	550.000	220.00		110.00	110.00
	SALES NOT GENERATED BUT SOLD IN MEXICO BY EL PASO ELECTRIC CO.						
8	Retail Sales	4,755.074	5,043.000	—0—			
	Wholesale Sales						
9	PNM	200.000	200.000	—0—			
10	SRP	250.000	250.000	—0—			
11	APS	857.000	857.000	—0—			
	TOTAL SALES IN NEW MEXICO BY EL PASO ELECTRIC COMPANY	495,738.241	526,219.484	$205,763.40	$166,597.32	$37,814.48	$ 1,351.60
	SALES OTHER THAN NEW MEXICO						
13	Texas (Retail & Wholesale)	1,735,948.436					
14	Republic of Mexico	240,840.000					
15	TOTAL SALES OTHER THAN NEW MEXICO	1,976,788.436		$280,432.60	—0—	—0—	$280,432.60
16	GRAND TOTAL	2,472,526.677		$486,196.00	$166,597.32	$37,814.48	$281,784.20

For the period from July, 1975 through March, 1976, the Electrical Energy Tax applicable to EPE is measured by the energy generated by EPE in New Mexico, 1,199,754.000 MWH (Schedule 1, Line 3), plus the energy purchased at wholesale from other plaintiffs, 21,197.00 MWH (Schedule 1, Line 6). The total generation in New Mexico totals 1,220,951.000 MWH (Schedule 1, Line 7). The tax is $.40 per MWH which amounts to $486,196.00 (Schedule 3, Line 4). Of that amount, $204,411.80 (Schedule 4, Line 16, Columns D and E), is offset by credits under § 9B or by reimbursements under § 9C, and the balance of $281,784.20 (Schedule 4, Line 16, Column E) is payable by EPE.

17. EL PASO ELECTRIC COMPANY is in direct competition with intrastate New Mexico utilities. This competitive situation arises in three areas:

(1) in the serving of other utilities at wholesale rates;

(2) in the serving of large industrial loads where the industry has the option of locating in either an El Paso area of service or that of another utility; and

(3) in the serving of large governmental and industrial loads which are to be located in uncertified areas for which any New Mexico utility can compete.

/s/ MARTIN P. KURIC
Martin P. Kuric

SUBSCRIBED AND SWORN to before me this 10th day of September, 1976.

/s/ CHARLES MAIS
Notary Public

My commission expires:

CHARLES MAIS, Notary Public
In and for the County of El Paso, Texas.

Affidavit of C. M. Perkins
(Affidavit No. 3 to Plaintiffs' Motion for Summary Judgement)

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

STATE OF ARIZONA)
) ss
County of)

C. M. PERKINS, being first duly sworn, upon his oath, deposes and says:

1. That he is the Director of Project Planning of SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, and as such he is authorized to make this Affidavit, and that statements herein are made upon his personal knowledge and belief.

2. The plaintiffs in this proceeding are Arizona Public Service Company (APS), Tucson Gas & Electric Company (TGE), Salt River Project Agricultural Improvement and Power District (SRP), Southern California Edison Company (Edison), and El Paso Electric Company (EPE).

3. Salt River Project Agricultural Improvement and Power District is a political subdivision of the State of Arizona operating a federal reclamation project pursuant to contracts with the Secretary of the Interior. SRP

distributes electricity at retail in Central Arizona, including metropolitan Phoenix, an area which encompasses approximately 2,900 square miles and an estimated population of 675,000. SRP also distributes electricity at wholesale to Pinal and Gila Counties, an area of approximately 2,400 square miles.

4. The 1975 aggregate generating capability of SRP's facilities is 2,197 megawatts of rated capacity, of which 160 megawatts of rated capacity or 7.3% is generated in New Mexico.

5. The Four Corners Power Plant Units 4 and 5 are owned by the plaintiffs as co-tenants with SRP having a 10% undivided interest.

6. For 1975, SRP paid or became liable for the following New Mexico taxes for San Juan County: $111,158.00. Similar New Mexico tax liabilities apply for 1976 and are reasonably expected for later years.

7. As shown on the Map of Principal Transmission Lines annexed to the Complaint and attached hereto as Exhibit A, the SRP electrical system is directly interconnected with the electrical system of each other plaintiff in this cause, and either directly or indirectly interconnected with the electrical systems of Public Service Company of New Mexico (PNM), United States Bureau of Reclamation (USBR), and Utah Power & Light Company (Utah P&L). The interconnecting transmission lines constitute an interstate grid encompassing the entire Western United States and portions of Canada and the Republic of Mexico.

8. Deliveries of energy at Four Corners and San Juan Generating Stations are made through switchyard facilities represented on Exhibit B annexed hereto. A portion of SRP's entitlement at Four Corners is delivered to its load centers via U.S. Bureau of Reclamation (USBR) transmission lines through Shiprock and Flagstaff; the bal-

ance is exchanged with USBR for other energy delivered in Arizona.

9. Before it can be transmitted to market areas within or without New Mexico, electrical energy generated in New Mexico must be transformed as shown on Exhibit B and allocated by switchyard facilities to the transmission lines shown on Exhibit C, which serve particular markets. Before such transformation and allocation, the market in which energy will be distributed cannot be identified.

Exhibit B. Exhibit B shows schematically the relation between generation, transformation, and transmission at the Four Corners and San Juan Generating Stations. At Four Corners energy is generated at 22 kv on Units 4 and 5. After generation, the voltage of the energy must be increased by transformers (shown as wavy lines on Exhibit B) to the voltages required by the various transmission lines. Transformers change voltage by electromagnetic induction, producing an induced current at higher or lower voltage, which is then allocated to particular transmission lines through the switchyard facilities. At Four Corners, energy generated on Unit 4 at 22 kv is transformed to 345 kv for delivery at the bus ties to APS' and PNM's transmission lines; and energy generated on Units 1, 2 and 3 at 20 kv is transformed to 230 kv for delivery at the bus tie to PNM's and USBR's transmission lines and is again transformed to 345 kv for delivery through the 345 kv bus. The transformers between bus bars shown on Exhibit B both "step up" and "step down" the voltages of the energy, which "flows" in either direction between buses at different times. No one generator on the interconnected system serves a particular transmission line.

Exhibit C. Exhibit C shows schematically the transmission paths from New Mexico generating stations to relevant markets. Energy delivered at the Four Corners 230 kv bus to the USBR is available both for transmission of SRP's entitlement at Four Corners to its service areas in

Arizona and for delivery to rural cooperatives which transmit and distribute electricity in New Mexico.

10. The plaintiffs, as co-tenants of the Four Corners Power Plant, have made agreements for economy and emergency sales of energy. A "Six Party Economy Energy Agreement" provides for voluntary sales of energy when available energy of the interconnected systems can be purchased more economically than employing additional generators on the buyer's system, and "Principles of Interconnected Operation", and a "Unit Tripping Agreement" provide for emergency services as required by a co-tenant. The point of delivery for energy supplies under those agreements is ordinarily agreed upon between the parties. Where the switchyards at the Four Corners Power Plant are the only points of interconnection between the parties' systems, deliveries are necessarily made in New Mexico. All such sales of energy are wholesale sales in interstate commerce over which the Federal Power Commission has exclusive jurisdiction (except in the case of SRP which is not subject to such jurisdiction). The agreements referred to above have been filed as tariffs with the FPC on behalf of each of the plaintiffs, except SRP.

11. 1975 wholesale sales and transfers made by SRP in accordance with the agreements described in the preceding paragraph, are set forth in the following tables:

	APS	TGE	Edison	PNM	EPE	Other New Mexico Utilities
Delivered	—0—	2,216,000	—0—	320,000	200,000	—0—
Received	—0—	1,145,000	—0—	94,735,000	18,766,000	32,689,000

The Electrical Energy Tax measured by the energy sold at wholesale after July 1, 1975, is passed on by each plaintiff in whole or in part to the wholesale purchaser. Where the eventual wholesale purchaser is a "person selling the electricity for consumption in New Mexico", § 9C of the Electrical Energy Tax Act requires the purchaser to reim-

burse the wholesaler for the amount of the credit accorded the ultimate retailer by § 9B, and § 9C also requires that such credit be assigned by the wholesaler to its purchaser. Regulations issued under those provisions required each generating wholesaler to assign a "potential credit" equal to the Electrical Energy Tax to his wholesale purchaser, who is entitled to an actual credit against the gross receipts tax if the electrical energy is sold "for consumption in New Mexico."

12. On September 25, 1975, SRP timely filed with defendant a return (Form EE-1) showing that for July, 1975, energy generated by SRP in New Mexico was 48,145,000 kwh, and the amount due under the Electrical Energy Tax for such period was $19,258.00. The amount of tax shown on the returns was duly protested without payment in accordance with § 72-13-38 N.M.S.A., 1953. The tax for subsequent months has been similarly returned and the unpaid portion has been timely protested by SRP.

13. SRP is subject to the following Arizona taxes and in 1975 became liable for the amounts shown:

Corporate Income	Unemployment	State Sales	City Sales	State Use
[Exempt]	$3,135	$6,943,943	$2,357,498	$1,446,091

City Use	Ad Valorem	City Franchise	Excise and Other
$9,610	$16,621,310*	None	$104,536

TOTAL: $27,486,123

* Voluntary payments

Similar liabilities apply for 1976 and are reasonably expected for later years.

Electrical energy generated in New Mexico, in respect to which the Electrical Energy Tax is payable, is sold by SRP at retail to consumers in Arizona subject to the state and city taxes shown above. There is no provision of Arizona

law under which SRP is entitled to any credit, offset, rebate or other form of recoupment for the Electrical Energy Tax paid in respect to such energy.

/s/ ILLEGIBLE

SUBSCRIBED AND SWORN to before me this 13th day of September, 1976.

/s/ ILLEGIBLE

My commission expires: May 3, 1979

Affidavit of A. L. Maxwell
(Affidavit No. 4 to Plaintiffs' Motion for Summary Judgement)

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

A. L. MAXWELL, being first duly sworn, upon his oath, deposes and says:

1. That he is a Vice President of SOUTHERN CALIFORNIA EDISON COMPANY, and as such he is authorized to make this Affidavit, and that statements herein are made upon his personal knowledge and belief.

2. The plaintiffs in this proceeding are Arizona Public Service Company (APS), Tucson Gas & Electric Company (TGE), Salt River Project Agricultural Improvement and Power District (SRP), Southern California Edison Company (Edison), and El Paso Electric Company (EPE).

3. Edison is a California corporation with its principal office in Rosemead, California, and it is regulated as a public utility by the California Public Utility Commission.

4. Edison distributes electricity at retail in Central and Southern California outside Los Angeles and certain

other cities, an area which encompasses approximately 50,000 square miles and an estimated population of 7,560,000.

5. The aggregate generating capability of Edison's facilities is 13,699 megawatts of rated capacity, of which 768 megawatts of rated capacity or 5.6% is generated in New Mexico.

6. The Four Corners Power Plant Units 4 and 5 are owned by the plaintiffs as co-tenants with Edison having a 48% undivided interest.

7. For 1975, Edison paid or became liable for the following New Mexico taxes:

Apportioned Corporate Income	San Juan	Corporate Franchise
$8,976	$538,763	$10

Similar New Mexico tax liabilities apply for 1976 and are reasonably expected for later years.

8. As shown on the Map of Principal Transmission Lines annexed to the Complaint and attached hereto as Exhibit A, the Edison electrical system is directly interconnected with the electrical system of each other plaintiff in this cause, and either directly or indirectly interconnected with the electrical systems of Public Service Company of New Mexico (PSM), United States Bureau of Reclamation (USBR), and Utah Power & Light Company (Utah P&L). Edison's system is also directly connected with San Diego Gas & Electric Company, the Department of Water and Power, City of Los Angeles, the Pasadena Department of Water and Power, and Pacific Gas & Electric Company; its system is indirectly but substantially interconnected with the several Pacific Northwest systems and through them to other utility systems in the western United States. The interconnecting transmission lines constitute an interstate

grid encompassing the entire western United States and portions of Canada and the Republic of Mexico.

9. Deliveries of energy at the Four Corners and San Juan Generating Stations are made through switchyard facilities represented on Exhibit B annexed hereto. Edison's entitlement at Four Corners is transmitted to its Eldorado Substation in Nevada over APS' 500 kv transmission line to the Arizona line and Edison's 500 kv line thence to such Substation.

10. Before it can be transmitted to market areas within or without New Mexico, electrical energy generated in New Mexico must be transformed as shown on Exhibit B and allocated by switchyard facilities to the transmission lines shown on Exhibit C, which serve particular markets. Before such transformation and allocation, the markets in which energy will be distributed cannot be identified.

Exhibit B. Exhibit B shows schematically the relation between generation, transformation, and transmission at the Four Corners and San Juan Generating Stations. At Four Corners energy is generated at 22 kv on Units 4 and 5. After generation the voltage of the energy must be increased by transformers (shown as wavy lines on Exhibit B) to the voltages required by the various transmission lines. Transformers change voltage by electromagnetic induction, producing an induced current at higher or lower voltage, which is then allocated to particular transmission lines through the switchyard facilities. At Four Corners, energy generated on Unit 5 at 22 kv is transformed to 500 kv for delivery at the bus tie to APS' 500 kv transmission line and thence to Edison's service areas in California. The transformers between bus bars shown on Exhibit B both "step up" and "step down" the voltages of the energy, which "flows" in either direction between buses at different times. No one generator on the interconnected system serves a particular transmission line.

Exhibit C. Exhibit C shows schematically the transmission paths from New Mexico generating stations to relevant markets. All energy delivered to APS at the 500 kv Four Corners bus is transmitted to Edison's service areas in California.

11. The plaintiffs, as co-tenants of the Four Corners Power Plant, have made agreements for economy and emergency sales of energy. A "Six Party Economy Energy Agreement" provides for voluntary sales of energy when available energy of the interconnected systems can be purchased more economically than employing additional generators on the buyer's system, and "Principles of Interconnected Operation", and a "Unit Tripping Agreement" provide for emergency services as required by a co-tenant. The point of delivery for energy supplies under those agreements is ordinarily agreed upon between the parties. Where the switchyards at the Four Corners Power Plant are the only points of interconnection between the parties' systems, deliveries are necessarily made in New Mexico. All such sales of energy are wholesale sales in interstate commerce over which the Federal Power Commission has exclusive jurisdiction (except in the case of SRP which is not subject to such jurisdiction). The agreements referred to above have been filed as tariffs with the FPC on behalf of each of the plaintiffs, except SRP.

12. 1975 wholesale sales and transfers made by Edison to plaintiffs in accordance with the agreements described in the preceding paragraph, are set forth in the following table:

	APS	TGE	SRP	PNM	EPE
Delivered	11,513,000	800,000	—0—	—0—	3,050,000
Received	36,272,000	1,238,000	—0—	12,449,000	2,012,000

The Electrical Energy Tax measured by the energy sold at wholesale after July 1, 1975, is passed on by each plaintiff in whole or in part to the wholesale purchaser. Where

the eventual wholesale purchaser is a "person selling the electricity for consumption in New Mexico", § 9C of the Electrical Energy Tax Act requires the purchaser to reimburse the wholesaler for the amount of the credit accorded the ultimate retailer by § 9B, and § 9C also requires that such credit be assigned by the wholesaler to its purchaser. Regulations issued under those provisions require each generating wholesaler to assign a "potential credit" equal to the Electrical Energy Tax to his wholesale purchaser, who is entitled to an actual credit against the gross receipts tax if the electrical energy is sold "for consumption in New Mexico."

13. On September 25, 1975, Edison timely filed with defendant a return (Form EE-1) showing that for July, 1975, energy generated by Edison in New Mexico was 231,003,000 kwh, and the amount due under the Electrical Energy Tax for such period was $92,401.20. The amount of tax shown on the returns was duly protested without payment in accordance with § 72-13-38 N.M.S.A., 1953. The Tax for subsequent months has been similarly returned and the unpaid portion has been timely protested by Edison.

14. Edison is subject to the following Arizona taxes and in 1975 became liable for the amounts shown below:

Corporate Income	Unemployment	State Sales	City Sales	State Use
$9,173	$78	—0—	—0—	$55

City Use	Ad Valorem	City Franchise	Excise and Other
—0—	$329,481	—0—	—0—

TOTAL: $338,787

Similar liabilities were incurred during 1976 and are reasonably expected for later years.

There is no provision of Arizona law under which Edison is entitled to any credit, offset, rebate or other form of

recoupment for the Electrical Energy Tax paid in respect of such energy.

15. Edison is subject to the following California taxes and in 1975 paid the amounts shown:

Franchise Requirements	$ 11,850,291
Corporate Income	12,461,716
Unemployment	1,113,281
Use	3,712,821
Ad Valorem	84,602,841
Excise (gasoline, etc.)	420,000
Utility Users—Cities	16,100,000
TOTAL	$130,260,950

(1) 22 chartered cities in Edison's service territory impose taxes on consumers of electricity ranging from 3% to 8% of Edison's bills for electric service. Edison collects the tax without charge for the benefit of the cities. The California Sales and Use Tax Law, Revenue and Taxation Code § 6353, exempts Edison from the state sales tax, sales of gas, electricity, and water.

Similar tax liabilities are reasonably expected for later years. In addition, Edison has begun collection of a state tax on consumers of electricity at the rate of 1/10 of one mill per kilowatt hour. That tax will total approximately $4 million in 1975.

Electrical energy generated in New Mexico, in respect of which the Electrical Energy Tax is payable, is sold by Edison at retail to consumers in California subject to state and municipal taxes as shown above. There is no provision of California law under which Edison is entitled to any credit, offset, rebate, or other form or recoupment for the Electrical Energy Tax paid in respect of such energy.

/s/ A. L. MAXWELL

SUBSCRIBED AND SWORN to before me this 9th day of September, 1976.

/s/ DONA MARY WILCOMB
Notary Public

My commission expires June 18, 1977.

Affidavit of Kenneth L. Saul
(Affidavit No. 5 to Plaintiffs' Motion for Summary Judgement)

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

VS.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

KENNETH L. SAUL, being first duly sworn, upon his oath, deposes and says:

1. That he is the Vice President and Controller of TUCSON GAS & ELECTRIC COMPANY, and as such he is authorized to make this Affidavit, and that statements herein are made upon his personal knowledge and belief.

2. The plaintiffs in this proceeding are Arizona Public Service Company (APS), Tucson Gas & Electric Company (TGE), Salt River Project Agricultural Improvement and Power District (SRP), Southern California Edison Company (Edison), and El Paso Electric Company (EPE).

3. TGE is an Arizona corporation with its principal office in Tucson, Arizona, and as a public service corporation TGE is regulated by the Arizona Corporation Commission.

4. TGE distributes electricity at retail in the greater metropolitan Tucson and Fort Huachuca areas, a certifi-

cated service area which encompasses approximately 1,155 square miles and an estimated population of 440,000.

5. The aggregate generating capability of TGE's facilities is 1,192 megawatts of rated capacity, of which 277 megawatts of rated capacity or 23.2% is generated in New Mexico.

6. TGE and Public Service Company of New Mexico (PNM) are equal co-owners of the San Juan Generating Station, of which generating Unit 2 is presently in operation. The Four Corners Power Plant Units 4 and 5 are owned by the plaintiffs as co-tenants with TGE having a 7% undivided interest.

7. For 1975, TGE paid or became liable for the following New Mexico taxes:

Apportioned Corporate Income	Ad Valorem Taxes			
	San Juan	McKinley	Valencia	Catron
$39,000 (Est)	$475,182	$181,889	$35,288	$104,084

Corporate Franchise	Compensating	Excise
$10	$48,427	$31

TOTAL: $883,911

Similar New Mexico tax liabilities apply for 1976 and are reasonably expected for later years.

8. As shown on the Map of Principal Transmission Lines annexed to the Complaint and attached hereto as Exhibit A, the TGE electrical system is directly interconnected with the electrical system of each other plaintiff in this cause, and either directly or indirectly interconnected with the electrical systems of Public Service Company of New Mexico (PNM), United States Bureau of Reclamation (USBR), and Utah Power & Light Company (Utah P&L). The interconnecting transmission lines constitute an interstate grid encompassing the entire Western United States and portions of Canada and the Republic of Mexico.

9. Deliveries of energy at the Four Corners and San Juan Generating Stations are made through switchyard facilities represented on Exhibit B annexed hereto. Transmission paths to the load centers of each plaintiff are represented on Exhibit C. APS' and TGE's entitlements at Four Corners (or energy purchased from others at Four Corners) and TGE's share of power and energy generated at San Juan are transmitted to their respective load centers over transmission facilities owned by APS and TGE.

10. Before it can be transmitted to market areas within or without New Mexico, electrical energy generated in New Mexico must be transformed as shown on Exhibit B and allocated by switchyard facilities to the transmission lines shown on Exhibit C, which serve particular markets. Before such transformation and allocation, the market in which energy will be distributed cannot be identified.

Exhibit B. Exhibit B shows schematically the relation between generation, transformation, and transmission at the Four Corners and San Juan Generating Stations. At San Juan, energy is generated at 24 kv, and after generation the voltage of the energy must be increased by transformers (shown as wavy lines on Exhibit B) to the voltages required by the various transmission lines. Transformers change voltage by electromagnetic induction, producing an induced current at higher or lower voltage, which is then allocated to particular transmission lines through the switchyard facilities. The transformers between bus bars shown on Exhibit B both "step up" and "step down" the voltages of the energy, which "flows" in either direction between buses at different times. No one generator on the interconnected system serves a particular transmission line.

Exhibit C. Exhibit C shows schematically the transmission paths from New Mexico generating stations to relevant markets. Energy delivered to APS' transmission lines

at the 345 kv Four Corners bus is transmitted to the APS and TGE service areas in Arizona; and all energy delivered to TGE's transmission line at the 345 kv San Juan bus is transmitted to its service areas.

11. The plaintiffs, as co-tenants of the Four Corners Power Plant, have made agreements for economy and emergency sales of energy. A "Six Party Economy Energy Agreement" provides for voluntary sales of energy when available energy of the interconnected systems can be purchased more economically than employing additional generators on the buyer's system, and "Principles of Interconnected Operation", and a "Unit Tripping Agreement" provide for emergency services as required by a co-tenant. The point of delivery for energy supplies under those agreements is ordinarily agreed upon between the parties. Where the switchyards at the Four Corners Power Plant are the only points of interconnection between the parties' systems, deliveries are necessarily made in New Mexico. All such sales of energy are wholesales sales in interstate commerce over which the Federal Power Commission has exclusive jurisdiction (except in the case of SRP which is not subject to such jurisdiction). The agreements referred to above have been filed as tariffs with the FPC on behalf of each of the plaintiffs, except SRP.

12. 1975 wholesale sales and transfers made by TGE in accordance with the agreements described in the preceding paragraph, are set forth in the following table:

	APS	SRP	Edison	PNM	EPE
Delivered	5,898,000	5,285,000	16,780,000	1,555,000	—0—
Received	795,000	2,216,000	—0—	77,894,000	2,207,000

In 1975, TGE also delivered 45,491,000 kwh to, and received 38,546,000 kwh from the United States Bureau of Reclamation.

The Electrical Energy Tax measured by the energy sold at wholesale after July 1, 1975, is passed on by each plain-

tiff in whole or in part to the wholesale purchaser. Where the eventual wholesale purchaser is a "person selling the electricity for consumption in New Mexico," § 9C of the Electrical Energy Tax Act requires the purchaser to reimburse the wholesaler for the amount of the credit accorded the ultimate retailer by § 9B, and § 9C also requires that such credit be assigned by the wholesaler to its purchaser. Regulations issued under those provisions require each generating wholesaler to assign a "potential credit" equal to the Electrical Energy Tax to his wholesale purchaser, who is entitled to an actual credit against the gross receipts tax if the electrical energy is sold "for consumption in New Mexico."

13. On September 25, 1975, TGE timely filed with defendant a return (Form EE-1) showing that for July, 1975, energy generated by TGE in New Mexico was 145,206,000 kwh, and the amount due under the Electrical Energy Tax for such period was $58,082.40. The amount of tax shown on the returns was duly protested without payment in accordance with § 72-13-38 N.M.S.A., 1953. The Tax for subsequent months has been similarly returned and the unpaid portion has been timely protested by TGE.

14. TGE is subject to the following Arizona taxes and in 1975 became liable for the amounts shown.

Corporate Income	Unemployment	State Sales	City Sales	State Use
$308,000 (Est)	$48,626	$6,087,885	$1,533,706	$132,982

City Use	Ad Valorem	City Franchise	Excise and Other
—0—	$17,401,907	$1,675,724	$356,229

TOTAL: $27,545,059

Similary liabilities apply for 1976 and are reasonably expected for later years.

Electrical energy generated in New Mexico, in respect of which the Electrical Energy Tax is payable, is sold by

TGE at retail to consumers in Arizona subject to the state and city taxes shown above. There is no provision of Arizona law under which TGE is entitled to any credit, offset, rebate or other form of recoupment for the Electrical Energy Tax paid in respect of such energy.

/s/ KENNETH L. SAUL

SUBSCRIBED AND SWORN to before me this 14th day of September, 1976.

/s/ JEAN E. KETTLEWELL
Notary Public

My commission expires:

February 1, 1978.

Affidavit of Phoebe Fornaciari
(Affidavit No. 6 to Plaintiffs' Motion for Summary Judgement)
(Without Attachments)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Plaintiffs,*

v.

FRED O'CHESKEY, ET AL., *Defendants.*

AFFIDAVIT No. 6
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF NEW MEXICO)
) SS:
COUNTY OF SANTA FE)

PHOEBE FORNACIARI, being first duly sworn upon her oath, deposes and says:

1. That affiant is employed by the law firm of MONTGOMERY, FEDERICI, ANDREWS & HANNAHS as a paralegal assistant and was so employed during the time that the 1st Session of the 32nd Legislature of New Mexico considered the bill and substitute bills which, upon enactment and approval of the Governor, became Laws 1975, Chapter 263; to-wit: January through March, 1975.

2. That during the aforesaid period, either the affiant or a member of the law firm attended all Senate and House Committee and floor sessions at which such bills were formally considered and a member of the law firm tape recorded these discussions and debate concerning said bills; that all Senate and House Committee and floor sessions were attended by the affiant, with the exception of the ses-

sion on the Senate floor on March 11, 1975, which was attended by another member of the law firm.

3. That attached hereto are transcripts of the aforesaid tape recordings, which affiant has reviewed and compared with the tape recordings made by affiant or another member of the law firm and the attached transcripts are true and correct transcriptions of the tape recordings of such discussions and debates.

4. That attached hereto as Exhibits 1, 2 and 3 are true and correct copies of the bills and substitute bills considered during the 1st Session of the 32nd Legislature and which resulted, upon enactment and approved, in Laws 1975, Chapter 263, to-wit:

Exhibit 1 to Affidavit No. 6: Senate Bill 258;

Exhibit 2 to Affidavit No. 6: Senate Corporations Committee Substitute for Senate Bill 258; and

Exhibit 3 to Affidavit No. 6: Senate Finance Committee Substitute for Senate Corporations Committee Substitute for Senate Bill 258.

5. That as more fully appears from the Exhibits and transcripts attached hereto:

In the first hearing on the bill (S.B. 258) before the Senate Corporations Committee on February 27, 1975, Senator Aubrey Dunn, the sponsor of the bill, introduced the Commissioner of Revenue to explain the operation and effect of the bill. The Commissioner described the way in which the energy tax would be credited against the gross receipts tax applicable to a New Mexico sale of the energy and concluded, "The taxpayer in California or the consumer in California would bear the brunt of the tax." Before the Senate Finance Committee on March 5, 1975, Senator Dunn stated that "there will be very little possibiliy of any of this being passed on to the New Mexico consumer," and the Commissioner of Revenue stated that the tax was "really

on exported power." On the Senate floor on March 11, 1975, Senator Dunn explained the bill as follows:

> [A]nd the idea behind it, Mr. President, is that we levy this generating tax and we allow the generating companies to take credit for the gross receipts tax which they collect on this power as they sell it, against this particular amount of generation tax. When this is done, Mr. President, it forms a washout which allows that most of the tax could be passed on in almost 99.9 per cent of the time to the residents of Arizona and California."

In the House, Senator Dunn described the intent of the Senate-passed bill to the Taxation and Revenue Committee on March 19, 1975, as follows:

> "Mr. Chairman, the main idea behind this is that the generator who is responsible for this tax may apply against that tax the gross receipts which he collects. Mr. Chairman, I think this is a very important part of it. And in almost one hundred per cent, but not in every case, I'd hasten to say that there would be hardly any taxation on the individual consumer in the State of New Mexico, in this particular area."

Senator Dunn later stated at the same hearing that "a very, very large percentage of it—almost a hundred per cent, in my estimation—will be passed on and can be passed on to Arizona and California" and that "this particular tax was for the consumer, Mr. Chairman, for the consumer in Arizona and for the consumer in California." On the House floor, the bill was sponsored by Representative Edward J. Lopez, Chairman of the Taxation and Revenue Committee. Representative Lopez explained his sponsorship of the bill as follows:

> "I find myself in the unique position this year, Mr. Speaker, of having to support a measure of this nature.

As you all know, for the last four years, I've stood up in opposition to the imposition of this sort of tax. But my opposition was based on the fact that there was no way to impose the tax without placing a burden on the New Mexico taxpayer or utility user. However, this year a device has been worked out whereby there is a credit in it and the tax will be paid by out-of-state residents with no additional burden on our New Mexico residents. So, for that reason I stand before you today supporting this bill and carrying it."

The House thereupon passed the bill.

Further affiant sayeth not.

/s/ PHEOBE FORNACIERI
Pheobe Fornacieri

SUBSCRIBED AND SWORN to before me this 8th day of September, 1976.

/s/ VIRGINIA C. THOMPSON
Notary Public

My Commission Expires:

September 11, 1979

(SEAL)

Affidavit of Carl M. Turner
(Affidavit No. 7 to Plaintiffs' Motion for Summary Judgement)
(Without Exhibits)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Plaintiffs,*

vs.

FRED O'CHESKEY, ET AL., *Defendants.*

AFFIDAVIT OF CARL M. TURNER

STATE OF NEW MEXICO)
) ss
COUNTY OF SANTA FE)

CARL M. TURNER, being first duly sworn upon his oath, deposes and says:

1. Affiant is employed by the New Mexico Rural Electrification Cooperation Association as executive manager and was so employed during the time that the 1st Session of the 32nd Legislature of New Mexico considered the bill and substitute bills which, upon enactment and approval of the Governor, became Laws 1975, Chapter 263, to-wit: January through March, 1975. During the aforesaid period, affiant attended all Senate and House Committee and floor sessions at which such bills were formally considered.

2. Attached hereto as Exhibits 1, 2, 3 and 4 are true and correct copies of the following documents distributed by the Commissioner of Revenue to members of the Legislture in connection with said bills, to-wit:

Exhibit 1: Bill Review Report dated February 24, 1975 concerning Senate Bill 258;

Exhibit 2: Bill Review Report dated February 26, 1975 concerning Senate Corporations Committee Substitute for Senate Bill 258;

Exhibit 3: Bill Review Report dated March 10, 1975 concerning Senate Finance Committee Substitute for Senate Corporations Committee Substitute for Senate Bill 258; and

Exhibit 4: Memorandum to Senator Aubrey Dunn dated March 10, 1975 concerning Senate Finance Committee Substitute for Senate Corporations Committee Substitute for Senate Bill 258.

3. Before Senate Finance Committee Substitute for Senate Corporations Committee Substitute for Senate Bill 258 was brought to the Senate floor, the Commissioner of Revenue recommended that the tax rate be reduced from five tenths of a mill to four tenths of a mill per kilowatt hour to avoid imposition of any part of the tax on energy consumed in New Mexico. In a memorandum dated March 10, 1975, to Senator Dunn, the Commissioner stated:

> "If the generating utility sells to other utilities in the state, the generation tax can be assigned along the route with the buyer reimbursing the utility generating the electricity for the generation tax. The ultimate retailer of the electricity can credit the generation tax against the gross receipts tax.
>
> "Under the generation tax rate of ½ mill per/KWH, of all the utilities in New Mexico, it appeared that only Southwestern Public Service Company might have to pass some generation tax on to New Mexico consumers. It appears that the amendment to 4/10 of a mill brings down the generation tax so that even in Southwestern's case the gross receipts tax more than offsets the generation tax."

The tax rate was thus reduced before the bill was passed by the Senate.

/s/ Carl M. Turner
Carl M. Turner

Subscribed and Sworn to before me this 10th day of September, 1976.

/s/ Rosemarie McCurry
Notary Public

My commission expires: 2-8-77

Plaintiffs' Answers to Supplemental Interrogatory No. 9

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

PLAINTIFFS' ANSWERS TO SUPPLEMENTAL INTERROGATORIES

Defendants, ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY and TUCSON GAS & ELECTRIC COMPANY, pursuant to Rule 33 of the Rules of Civil Procedure, hereby answer Defendants' Supplemental Interrogatories, dated October 6, 1976.

• • • • • • • • • •

9. With respect to the taxes paid to states other than New Mexico, as set forth in the affidavits in support of Plaintiffs' Motion for Summary Judgment, please state what of each tax is attributable to electricity generated in New Mexico, and please explain how it relates to such electricity.

(A) ARIZONA PUBLIC SERVICE COMPANY (APS)

	Arizona Tax		
		Attributable to New Mexico Generation	
Type of Arizona Tax	Total	Amount	Percentage
State Sales	$12,315,992	$4,077,617	33.11%
City Sales	1,193,116	391,289	32.80%
City Franchise	3,629,957	1,180,596	32.52%
Corporation Commission Regulatory Assessment	497,773	162,262	32.60%
Income	1,515,687	516,089	34.05%

The above taxes are revenue related and are directly related to electricity generated in New Mexico. A portion of Arizona ad valorem, payroll, etc., taxes which relate to the transmission and/or distribution of electricity is also attributable to New Mexico generation, but have not been apportioned at this time.

(B) EL PASO ELECTRIC COMPANY (EL PASO)

The nature of an interconnected transmission and generation system makes it impossible to specify the origin of electric energy consumed throughout the system. For this reason, the Company compared its New Mexico generation to its New Mexico consumption and arrived at a net excess generation of 902,843 MWH. It was assumed that this excess generation was absorbed by the Company's Texas load, and the appropriate percentage of gross receipts taxes paid in Texas was attributed to the excess generation in New Mexico.

Theoretically, a portion of the Texas ad valorem taxes is attributable to New Mexico generation, but the data necessary to make such a determination is not available.

Total Generated in New Mexico and Sold Outside New Mexico in 1975 •	930,340 MWH
Less: Sales to Other Utilities: (1)	
APS	6,524
TG&E	2,207
SRP	18,766
Total Generated in New Mexico; Sold in Texas & Mexico in 1975	902,843 (MWH)
Total Sales in Texas for 1975 (Includes Sales to R.G. Co-op. & Republic of Mexico (2)	2,582,075 (MWH)

902,843 ÷ 2,582,075 = 34.97% (% of Texas Sales that are generated in New Mexico)

1975 Gross Receipts Tax Paid to Texas	$1,139,942.88
×	34.97%
Texas Gross Receipts Tax Attributable To Generation in New Mexico	$ 398,638.03

• Is comprised principally of electricity for Company's customers in Texas, and for International Export to Republic of Mexico; also included are amount sold to other utilities, delivered at Four Corners, New Mexico for ultimate consumption outside of New Mexico. (TAKEN FROM INTERROGATORY NO. 5, DOCKET NO. 50245)

(1) Taken from El Paso's 1975 Annual Report to the Federal Power Commission, Page 424.

(2) Taken from El Paso's 1975 Annual Report to the Federal Power Commission, Pages 410 and 411 for total Texas sales and Pages 412 and 413 for Sales for Resale (excluding CPS).

(C) Salt River Project (SRP)

The Arizona taxes paid by Salt River Project in Arizona which are attributable to electricity generated in New Mexico consist of 12.4% of the State and City Sales Taxes as

set forth in SRP's affidavit in support of plaintiff's Motion for Summary Judgment.

(D) Southern California Edison Company (SCE)

The percentages of 1975 taxes paid by SCE in states other than New Mexico, attributable to electricity generated in New Mexico, are estimated as indicated below:

1. *California* (Southern California Edison Company, Affidavit Item 15)
   - A. Franchise Requirements
     1. Based on Revenues—.0569%•
     2. Based on Other than Revenues (Miles of line, etc.) —None
   - B. Corporate Income—.0569%•
   - C. Unemployment—None
   - D. Use—None
   - E. Ad Valorem—None
   - F. Excise (Gasoline, etc.)—None
   - G. Utility User's—.0569%•
2. *Arizona* (Southern California Edison Company, Affidavit Item 14)
   - A. Corporate Income—.0569%•
   - B. Unemployment—None
   - C. State Use—None
   - D. Ad Valorem—None

• Equals ratio of $\frac{3,134,110,000}{55,123,835,000} = .0569$

(E) Tucson Gas & Electric Company (TG&E)

Ratio of New Mexico Net Generation to Total System Net Generation—1975

New Mexico Net Generation (in kwh):

Four Corners	456,998,000*
San Juan	1,216,590,000*
Total New Mexico	1,673,588,000

$$\frac{\text{New Mexico Net Generation}}{\text{System Net Generation}} = \frac{1,673,588,000}{3,903,923,186^{**}} = 42.87\%$$

* FPC Form 1 (12-31-75), Page 432a, Line 12

** FPC Form 1 (12-31-75), Page 431, Line 9

1975 Arizona Taxes Allocated to New Mexico Generation

	Electric	Gas	Total
State Sales Tax	$5,003,346	$1,084,539	$6,087,885
New Mexico Generation Ratio	.4287		
	$2,144,934		

$\frac{\$2,144,934}{\$6,087,885} = 35.23\%$ of State Sales Tax

City Sales Tax	$1,215,070	$ 318,636	$1,533,706
New Mexico Generation Ratio	.4287		
	$ 520,901		

$\frac{\$520,901}{\$1,533,706} = 33.96\%$ of City Sales Tax

City Franchise Tax	$1,327,497	$ 348,227	$1,675,724
New Mexico Generation Ratio	.4287		
	$ 569,098		

$\frac{\$569,098}{\$1,675,724} = 33.96\%$ of City Franchise Tax

Arizona Corporation Commission Assessment	$ 214,341	$ 43,031	$ 257,672
New Mexico Generation Ratio	.4287		
	$ 92,017		

$\frac{\$92,017}{\$257,672} = 35.71\%$ of ACC Assessment

State Income Tax (est.)	$ 254,685	$ 53,315	$ 308,000
New Mexico Generation Ratio	.4287		
	$ 109,183		

$\frac{\$109,183}{\$308,000} = 35.45\%$ of State Income Tax

DATED this 22nd day of October, 1976.

BIGBEE, STEPHENSON, CARPENTER & CROUT
Richard N. Carpenter, Esq.
P. O. Box 669
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RODEY, DICKASON, SLOAN, AKIN & ROBB
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SNELL & WILMER
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Santa Fe, New Mexico 87501

/s/ By BRUCE NORTON
Attorneys for Plaintiffs

(Certificate of Mailing Omitted in Printing)

(Verification Omitted in Printing)

(Verification Omitted in Printing)

(Verification Omitted in Printing)

Office Memorandum

SNELL & WILMER

Office Memorandum

TO: Bruce Norton

FROM: Bud Jacobson

DATE: June 4, 1976

SUBJECT: New Mexico Generation Tax

Senator Paul Fannin believes he has the support now to get a bill through the Senate correcting the New Mexico tax situation. He very much wants the language of the Amendment to be reviewed by an expert to make sure that in fact it does the job. I gather the language was drafted by a man in Senator Fannin's office named Bob Cable.

I talked with Senator Fannin Friday afternoon and told him you would be in Washington Monday and Tuesday, arriving mid-afternoon Monday at the Watergate. He asked that I get you a copy of the proposed language [copy attached] so you could study it before you get to Washington, making what changes you believe are in order.

NEXT HE ASKED THAT I BE SURE AND HAVE YOU CALL HIM AS SOON AS YOU ARRIVE MONDAY AFTERNOON AND ASK FOR HIM OR GORDON GILMAN. Mr. Cable, in his office, will not be back till Tuesday, BUT SENATOR FANNIN WANTS YOU TO ASK FOR HIM FIRST.

My own impression is that the language is a disaster! Subsection (a) appears to prohibit a tax on interstate commerce, while New Mexico claims they are only taxing the local activity of generating energy in New Mexico, and, therefore, interstate commerce, claimed they, is not involved. Should the Court hold they are right, that this is a local activity, it would be untouched by this legislation.

Next, the Act talks of a higher rate, while my memory is that the retail rate in New Mexico for the local sale of energy is the same as the rate imposed on that shipped to Arizona.

You are the expert on this, and I am going only from memory.

Success and thank you.

Correspondence to Senator Fannin

LAW OFFICES
SNELL & WILMER

June 10, 1976

The Honorable Paul J. Fannin
United States Senator
3121 Dirkson Senate Building
Washington, D.C. 20510

Dear Senator Fannin:

On the way back from Washington and while here, I have reviewed in much greater detail the proposed Amendment to Section 1322. I am enclosing what we consider to be far better language.

The first sentence should read as follows:
SEC. 201

(a) No state, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out of state manufacturers, producers, wholesalers, retailers or consumers of that electricity.

Upon reflection, this change is critical. Without it, the State of New Mexico will simply make the argument that Section 201(a) does nothing but prohibit taxes on interstate commerce, the very argument they are making in Court today on the challenge to the generation tax. The old language is susceptible to the interpretation that the New Mexico generation tax is imposed upon the local event of generation and not upon the "generation of electricity for transmission in interstate commerce". If there is any way in which the language can be changed to the above, it should be done.

We have also changed the second sentence to read as follows:

> For purposes of this section a tax is discriminatory that results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

While this change is not as critical as the change in the first sentence, we do think that you might have difficulty with Senator Byrd with the old language. After reading carefully the West Virginia Statute and the case of *Virginia Electric and Power Company v. Haden*, 200 S.E. 2d 848 (W. Va., 1973), it is our opinion that with the phrase "gross or net" included, Virginia consumers, or out-of-state producers of electricity operating in West Virginia, could well argue that this bill prohibits West Virginia's tax. With the language as we have changed it, we do not feel that that argument will be available to them.

It is my understanding that the language has already come out of the Committee, and, therefore, the above changes may be difficult to make. However, Senator Byrd might well be of assistance in that respect in light of the above.

Finally, it is imperative that a clear legislative history be made. Without it, we could probably dream up another dozen arguments that it does not apply to the generation tax in New Mexico. None of them would withstand a good legislative history, however. We think the legislative history should include that the language in the second sentence is intended to include the New Mexico generation tax specifically.

Thank you for your continued cooperation in this matter and our continued best wishes.

Very truly yours,

/s/ Bruce Norton
Bruce Norton

BN:cd

Enclosure

Order

SANTA FE COUNTY
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, et al., *Plaintiffs*,

VS.

FRED O'CHESKEY, et al., *Defendants*.

ORDER

This matter having come on upon the oral stipulation of the parties in open court that leave may be granted to plaintiffs to file their First Amended Complaint and the Court having granted such leave in open court;

IT IS HEREBY ORDERED that plaintiffs be, and hereby are, granted leave to file their First Amended Complaint forthwith;

IT IS FURTHER ORDERED that defendants have, and hereby are granted, until November 5, 1976 to respond to such First Amended Complaint.

/s/ EDWIN L. FELTER
Edwin L. Felter

District Judge

First Amended Complaint

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,
Plaintiffs,

VS.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, and STATE OF NEW MEXICO, *Defendants*.

FIRST AMENDED COMPLAINT

Plaintiffs bring this action for declaratory judgment pursuant to the New Mexico Declaratory Judgment Act, Chapter 340, Laws 1975, with respect to the constitutionality and validity of the Electrical Energy Tax Act, Chapter 263, Laws 1975, and for their First Amended Complaint herein, state:

1. Arizona Public Service Company, an Arizona corporation, generates, transmits, distributes, and sells electrical energy within the State of Arizona, and is regulated as a public service corporation by the Arizona Corporation Commission.

2. El Paso Electric Company, a Texas corporation, generates, transmits, distributes and sells electrical energy within the States of New Mexico and Texas, and is regulated as a public utility in New Mexico by the New Mexico Public Service Commission and in Texas by the cities of El Paso, Van Horn, Anthony and Clint.

3. Salt River Project Agricultural Improvement and Power District (hereinafter "Salt River Project"), a political subdivision of the State of Arizona, operating a federal reclamation project pursuant to contracts with the Secretary of the Interior, generates, transmits, distributes and sells electrical energy within the State of Arizona.

4. Southern California Edison Company, a California corporation, generates, transmits, distributes and sells electrical energy within the State of California, and is regulated as a public utility by the California Public Utilities Commission.

5. Tucson Gas & Electric Company, an Arizona corporation, generates, transmits, distributes and sells electrical energy within the State of Arizona, and is regulated as a public service corporation by the Arizona Corporation Commission.

6. Fred O'Cheskey is Commissioner of the Bureau of Revenue of the State of New Mexico. The Bureau of Revenue is the agency of state government charged with the administration and enforcement of the Electrical Energy Tax Act.

7. The Four Corners Power Plant is an electrical generating station composed of five generating units and related facilities located on Indian lands leased from the Navajo Nation under Leases dated December 1, 1960 and July 1, 1966, duly approved by the Navajo Tribal Council and the Acting Secretary of the Interior.

8. Arizona Public Service Company owns and operates generating units Nos. 1, 2 and 3 at the Four Corners Power Plant. Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Southern California Edison Company and Tucson Gas & Electric Company each owns an undivided interest in generating units Nos. 4 and 5 at the Four Corners Power Plant.

9. The San Juan Generating Station is an electrical generating station composed of two generating units (one operational and one under construction) and related facilities located in San Juan County, near Waterflow, New Mexico.

10. Public Service Company of New Mexico and Tucson Gas & Electric Company each owns an undivided one-half (½) interest in the San Juan Generating Station.

11. The Rio Grande Generating Station is an electrical generating station composed of eight generating units and related facilities located in Dona Ana County, near Anapra, New Mexico and is wholly owned by El Paso Electric Company.

12. Certain of the plaintiffs (Arizona Public Service Company and El Paso Electric Company) sell electrical energy generated in New Mexico to a foreign country, Mexico.

13. As shown on the Map of Principal Transmission Lines annexed hereto as Exhibit "A", the electrical system of each plaintiff is directly interconnected with the system of each other plaintiff and with the electrical systems of Public Service Company of New Mexico, the U.S. Bureau of Reclamation, and Utah Power and Light Company. Southern California Edison Company's system is also directly connected with San Diego Gas & Electric Company, the Department of Water and Power, City of Los Angeles, the Pasadena Department of Water and Power, and Pacific Gas & Electric Company; its system is indirectly but substantially interconnected with the several Pacific Northwest systems and through them to other utility systems in the western United States. The interconnected transmission lines thus constitute an interstate grid encompassing the West.

14. As a consequence of the system interconnections described in the preceding paragraph, the demand for

electricity in the major urban centers served by the plaintiffs in Arizona, southern California, and the El Paso area of west Texas determines in substantial degree the amount of electrical energy generated at generating stations located in New Mexico (as well as those in other states). The electrical energy generated in New Mexico in response to such demand to which each plaintiff is entitled from its generation facilities is instantaneously transmitted over existing transmission lines to that plaintiff's service area.

15. All of the plaintiffs' above-described transactions in the generation and transmission of electrical energy at the Four Corners Power Plant, San Juan Generating Station, and the Rio Grande Generating Station, and the distribution and sales of such electrical energy, are in the course of commerce among the States and the Navajo Tribe of Indians, except for the aforesaid sales of electrical energy to Mexico, certain relatively insignificant sales made by Arizona Public Service Company within New Mexico to Utah International, Inc., for operation of the Navajo Mine which provides the fuel for the Four Corners Power Plant, and for certain sales by El Paso Electric Company within its service area in the State of New Mexico. All other sales or exchanges of electrical energy in New Mexico by any plaintiff are wholesale sales to other electric utility companies on the interconnected systems in interstate commerce under the exclusive jurisdiction of the Federal Power Commission. Such interstate sales give rise to no New Mexico gross receipts tax liability under the New Mexico Gross Receipts and Compensating Tax Act.

16. Each plaintiff pays income, ad valorem, franchise and other taxes imposed by the State of New Mexico or its political subdivisions on it and other taxpayers similarly situated, and income, ad valorem, sales and use (or their equivalent), franchise, excise and other taxes imposed by the state of its incorporation on it and other taxpayers similarly situated.

17. Section 3 of the Electrical Energy Tax Act, Chapter 263, Laws 1975 (hereinafter the "Act"), purports to impose on persons generating electricity a privilege tax of four-tenths of one mill "on each net kilowatt hour of electricity generated in New Mexico" for the purpose of sale.

18. Subsection 9B of the Act provides that the electrical energy tax paid on electricity generated and consumed in New Mexico may be credited against the gross receipts tax due New Mexico. No credits of any type are provided with respect to the electrical energy tax imposed upon electricity generated in New Mexico, but transmitted and consumed outside New Mexico.

19. Subsection 9C of the Act directs that the credit for electrical energy tax paid on electricity generated and consumed in New Mexico shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and further requires the assignee of such credit to reimburse the assignor for the amount of the credit so assigned.

20. The practical operation and effect of Sections 3 and 9 of the Act is to tax the generation of electricity in New Mexico, but shifts the entire incidence of such tax to those who sell or consume that electricity outside New Mexico since the person generating and selling electricity for consumption in New Mexico receives either a credit (under Subsection 9B) against his gross receipts tax due New Mexico or a reimbursement (under Subsection 9C) in an amount equal to the electrical energy tax payable on such electricity.

21. Plaintiffs' retail sales of electrical energy transmitted from generating facilities in New Mexico to plaintiffs' respective service areas in Texas, Arizona and California are subject to certain taxes imposed by those states, or the political subdivisions thereof, or both. Such taxes are variously denominated as sales or other types of excise taxes,

but are uniformly imposed upon, or passed on to consumers of electricity in those states.

22. There is no provision of law in Texas, Arizona or California whereby any of the plaintiffs are entitled to any credit, offset or rebate for the electrical energy tax imposed on them by New Mexico.

23. Public Service Company of New Mexico, an electric public utility regulated by the New Mexico Public Service Commission, with respect to its share of electrical energy generated at the Four Corners Power Plant and the San Juan Generating Station, will in practical effect sustain no additional tax burden under the Electrical Energy Tax Act due to the provisions of Subsections 9B and 9C of the Act permitting the amount of electrical energy tax paid to be assigned or credited against its gross receipts tax liability due the State of New Mexico.

24. El Paso Electric Company will in practical effect sustain no additional tax burden under the Electrical Energy Tax Act with respect to the electrical energy generated in New Mexico and sold by it to consumers in New Mexico due to the provisions of Subsections 9B and 9C of the Act allowing the electrical energy tax to be credited against its New Mexico gross receipts tax liability. It will sustain additional tax liability, however, on that electrical energy generated by it in New Mexico and sold by it to consumers outside New Mexico. This additional tax liability places El Paso at a competitive disadvantage with New Mexico utilities with whom it competes.

25. Plains Electric Generation and Transmission Cooperative, a New Mexico corporation, generates electrical energy at its generating plant near Algodones, New Mexico, and transmits and sells electrical energy solely to New Mexico electric utilities which are its members; however, by reason of Subsections 9B and 9C of the Act, it will incur no additional tax burden due to the Electrical Energy Tax Act.

26. Plaintiffs are informed and believe, and therefore allege, that no additional tax liability under the Electrical Energy Tax Act is incurred by any other person (as defined in the Electrical Energy Tax Act) engaged in the same business as plaintiffs upon electrical energy generated and consumed in New Mexico, due to the availability of the crediting provisions provided for under Subsections 9B and 9C of the Act.

27. Plaintiffs are informed and believe, and therefore allege, that all, or virtually all, of the additional taxes claimed to be due under the Electrical Energy Tax Act, after application of Subsections 9B and 9C of the Act, will be borne by those persons, including plaintiffs, engaged in the generation of electricity in New Mexico which is transmitted across and consumed outside the boundaries of the State of New Mexico.

28. Plaintiffs are informed and believe, and therefore allege, that the Act was enacted for the purpose of and the view to placing the exclusive burden of paying additional tax revenues to the State of New Mexico upon transactions in commerce among the several states and with the Indian Tribes.

29. The language of the Act, coupled with the practical application of the tax, constitutes a tax on the privilege of engaging in commerce among the several states.

30. Plaintiffs contend that the Act is unconstitutional and void for each and every one of the following reasons:

A. The Electrical Energy Tax Act violates the Commerce Clause of Article I, Section 8 of the United States Constitution by deliberately and invidiously discriminating against and imposing direct and multiple burdens upon each plaintiff's interstate commerce in the transmission and sale of electricity.

B. Application of the Electrical Energy Tax to these plaintiffs, measured by electricity generated in New

Mexico for transmission and sale in interstate commerce, is arbitrary, capricious and unreasonable and denies to each plaintiff the equal protection of the law, and the rights, privileges and immunities enjoyed by other members of the class defined as persons generating electrical energy in New Mexico, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution, and of Article II, Section 18, and Article IV, Section 26 of the New Mexico Constitution.

C. The Act deprives plaintiffs of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution.

D. The Act violates Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the United States Constitution.

31. Plaintiffs are informed and believe, and therefore allege, that defendants contend the Act is constitutional with respect to the matters set forth in paragraph No. 29 of this Complaint.

32. The Tax Reform Act of 1976, duly passed by the United States Congress and approved and enacted by President Gerald R. Ford on October 4, 1976, prohibits the imposition or assessment of certain taxes upon the generation or transmission of electricity:

TITLE II—DISCRIMINATION TAXES

Sec. 201. No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly,

in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

(b) Effective Date.—The amendment made by subsection (a) shall take effect beginning June 30, 1974.

33. Plaintiffs contend that the Act is rendered illegal, invalid, inoperative, and void from June 30, 1974, forward, by the terms and provisions of Tax Reform Act of 1976, Section 201.

34. Plaintiffs are informed and believe, and therefore allege, that defendants contend that the Act is not illegal, invalid, inoperative, or void from June 30, 1974, forward, as set forth in Paragraph 32 of this Complaint.

35. The plaintiffs, being persons whose rights, status or other legal relations are affected by the Act, request that the Court determine the questions of validity arising under the Act.

36. A genuine controversy exists between the plaintiffs and defendants with respect to the matters hereinbefore alleged; however, there is no controversy respecting the amount of the tax which would be payable by any plaintiff, if the Act is valid, nor with respect to the form or accuracy of any assessment of the tax thereunder.

37. Due to the necessity to construe and apply provisions of the United States Constitution, the New Mexico Constitution, and the Tax Reform Act of 1976, in order to resolve the controversy between plaintiffs and defendants, plaintiffs have no other plain, speedy and adequate remedy.

38. All conditions precedent to the commencement and maintenance of this action have occurred or been met.

WHEREFORE, plaintiffs pray:

A. That this Court adjudge and declare the Electrical Energy Tax Act, Chapter 263, Laws 1975, to be unconstitutional and void.

B. That the Court adjudge and declare the Electrical Energy Tax Act, Chapter 263, Laws 1975, to be illegal, invalid, inoperative and void from June 30, 1974, forward, by the terms and provisions of Tax Reform Act of 1976, Section 201.

C. That upon final hearing and determination the defendants be enjoined from enforcing the Electrical Energy Tax Act and plaintiffs have such other and further relief as may be proper in the premises.

BIGBEE, STEPHENSON, CARPENTER
& CROUT
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Santa Fe, New Mexico 87501

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WHITE, KOCH, KELLY & MCCARTHY
Ben J. Phillips
P. O. Box 787
Santa Fe, New Mexico 87501

/s/ By: BRUCE NORTON
Bruce Norton

Attorneys for Plaintiffs

I, Richard N. Carpenter, being one of the counsel for plaintiffs herein, do hereby certify that I served a copy of the First Amended Complaint upon defendants herein by personally delivering a copy thereof to one of the attorneys of record for the defendants on this 22nd day of October, 1976.

/s/ RICHARD N. CARPENTER
Richard N. Carpenter

Plaintiffs' Supplemental Motion for Summary Judgment

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,
Plaintiffs

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, and STATE OF NEW MEXICO, *Defendants*

PLAINTIFFS' SUPPLEMENTAL
MOTION FOR SUMMARY JUDGMENT

Come now the plaintiffs, by and through their attorneys undersigned, and, pursuant to Rule 56, N.M.R.C.P., move for summary judgment in their favor on all issues raised by the First Amended Complaint herein.

In support thereof, movants state that incorporated herein by reference are those supporting affidavits, being Affidavit Nos. 1-7, inclusive, attached to plaintiffs' original Motion for Summary Judgment and Affidavit No. 8 attached hereto, and that the pleadings and answers to interrogatories on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the movants are entitled to judgment as a matter of law.

WHEREFORE, plaintiffs pray that the Court enter its order rendering them summary judgment on the issues raised by their First Amended Complaint.

Respectfully submitted,

Frank Andrews, III, Esq.
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P. O. Box 2307
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/s/ By BRUCE NORTON
Bruce Norton, Esq.

BIGBEE, STEPHENSON, CARPENTER & CROUT
P. O. Box 669
Santa Fe, New Mexico 87501

/s/ By RICHARD N. CARPENTER
Richard Carpenter, Esq.

I hereby certify that I delivered in hand a copy of the foregoing pleading to opposing counsel of record this 5th day of November, 1976.

/s/ RICHARD N. CARPENTER
Richard N. Carpenter

Affidavit of Bruce Norton
(with Attachments A, B and C)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,
Plaintiffs

vs.

FRED O'CHESKEY, Commisioner of Revenue, BUREAU OF REVENUE, and STATE OF NEW MEXICO, *Defendants*

STATE OF ARIZONA
COUNTY OF MARICOPA, ss.

BRUCE NORTON, being first duly sworn, upon his oath, deposes and says:

1. That he is one of the attorneys for the plaintiffs in this action and that statements herein are made upon his personal knowledge and belief.

2. That attachment A to this affidavit is a true and correct reproduction of Section 1322 of the Tax Reform Act of 1976, as duly passed by the United States Congress and approved and enacted by President Gerald R. Ford on October 4, 1976, prohibiting the imposition or assessment of certain taxes upon the generation or transmission of electricity.

3. That attachment B to this affidavit is a true and correct reproduction of the Conference Report concerning Section 1322 of the Tax Reform Act of 1976.

4. That attachment C to this affidavit is a true and correct reproduction of the Senate Finance Committee Report on Section 1322 of the Tax Reform Act of 1976.

5. That attachment D to this affidavit is a true and correct reproduction of the Congressional Record—Senate, July 28, 1976, wherein a floor debate concerning Section 1322 of the Tax Reform Act of 1976 is set forth.

/s/ BRUCE NORTON
Bruce Norton

SUBSCRIBED AND SWORN to before me this 3rd day of November, 1976.

/s/ SUSAN J. MILLER
Susan J. Miller
Notary Public

My Commission Expires Sept. 16, 1980

CONFERENCE REPORT LEGISLATIVE LANGUAGE
H.R. 10612
SENATE REPORT NO. 94-1236

Title II—Discriminatory Taxes

Sec. 201. No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

(b) Effective Date.—The amendment made by subsection (a) shall take effect beginning June 30, 1974.

CONFERENCE REPORT STATEMENT OF MANAGERS
H.R. 10612
SENATE REPORT NO. 94-1236

1322. Prohibition of Discriminatory State or Local Taxes on Generation or Transmission of Electricity

House bill.—No provision.

Senate amendment.—Under present law, any restrictions on the power of States or their political subdivisions to tax goods or services produced in the taxing State for nondomiciliary use outside the taxing State are derived from court interpretations of the interstate commerce clause of the Constitution.

The Senate amendment prohibits any State or political subdivision of a State from directly or indirectly imposing any tax on the generation or transmission of electricity which discriminates against out-of-State users. This provision is effective for taxable years beginning after June 30, 1974.

Conference agreement.—The conference agreement follows the Senate amendment.

SENATE FINANCE COMM. REPORT NO. 94-938
H.R. 10612

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23. Prohibition of Discriminatory State Taxes on Generation of Electricity (sec. 1323 of the amendment)

Present law

Federal statutes provide few limitations on the power of States to tax nondomiciliaries or to impose special taxes on goods or services produced in the taxing State for nondomiciliary use outside the taxing State.

However, Public Law 86-272 [1] does establish certain minimum standards upon the power of a State to tax nondomiciliaries selling in the taxing State in interstate commerce. That Act did not affect the powers of States to tax goods or services produced within its boundaries for consumption outside its boundaries. Title II of the Act, however, also provided for further "studies of all matters pertaining to the taxation of interstate commerce. . . ."

Reasons for change

The committee has learned that one State places a discriminatory tax upon the production of electricity within

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[1] 86th Cong., 1st Sess., 73 Stat. 555 (1959).

its boundaries for consumption outside its boundaries. While the rate of the tax itself is identical for electricity that is ultimately consumed outside the State and electricity which is consumed inside the State, discrimination results because the State allows the amount of the tax to be credited against its gross receipts tax if the electricity is consumed within its boundaries. This credit normally benefits only domiciliaries of the taxing State since no credit is allowed for electricity produced within the State and consumed outside the State.[1] As a result, the cost of the electricity to nondomiciliaries is normally increased by the cost the producer of the electricity must bear in paying the tax. However, the cost to domiciliaries of the taxing State does not include the amount of the tax.

The committee believes that this is an example of discriminatory State taxation which is properly within the ability of Congress to prohibit through its power to regulate interstate commerce.

Explanation of provision

The committee amendment prohibits any State, or political subdivision of a State, from imposing a tax on or with respect to the generation of electricity for transmission in interstate commerce if the tax is discriminatory against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. A tax is considered discriminatory if it directly or indirectly results in the payment of a higher gross or net tax on electricity generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

This provision is not intended to prohibit, restrain, or burden any other State which currently imposes a nondiscriminatory tax on the generation of electricity.

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[1] However, a credit for the amount of a tax on the production of electricity imposed by a second State is allowed against the first State's gross receipts tax if the electricity is consumed in the first State.

This provision replaces the current Title II of Public Law 86-272, which is the title calling for further congressional studies. A number of studies of the problem of multi-state taxation of interstate commerce have already been made by congressional committees, and the present Title II is not needed to authorize any additional studies that may be needed.

The House bill contains no similar provision.

Effective date

The prohibition of discriminatory taxes made by this amendment applies with respect to taxable years beginning after June 30, 1974.

Revenue effect

This provision will have no impact upon Federal revenues.

Answer to the First Amended Complaint

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, *et al.*, *Plaintiffs*,

vs.

FRED O'CHESKEY, *et al.*, *Defendants*.

ANSWER TO THE FIRST AMENDED COMPLAINT

Defendants Fred O'Cheskey, the Bureau of Revenue and the State of New Mexico, for their answer to the first amended complaint, state as follows:

FIRST DEFENSE

The first amended complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The court lacks subject matter judisdiction over this action because of § 72-13-36, N.M.S.A. 1953.

THIRD DEFENSE

The court's discretion to render a declaratory judgment should not be exercised as to this action.

FOURTH DEFENSE

Section 201 of the Tax Reform Act of 1976, referred to in paragraph 32 of the first amended complaint, violates the Constitution of the United States.

FIFTH DEFENSE

1. Defendants deny the allegations of paragraph 1 of the first amended complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

2. Defendants admit the allegations of paragraph 2, except that, for lack of knowledge or information sufficient to form a belief as to the truth thereof, Defendants deny that El Paso Electric Company is regulated as a public utility by the cities of El Paso, Van Horn, Anthony and Clint, Texas.

3. Defendants deny the allegations of paragraph 3 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

4. Defendants deny the allegations of paragraph 4 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

5. Defendants deny the allegations of paragraph 5 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

6. Defendants admit the allegations of paragraph 6.

7. Defendants deny the allegations of paragraph 7 for lack of knowledge or information sufficient to form a belief as to the truth thereof, except that Defendants admit that the Four Corners Power Plant is an electrical generating station composed of 5 generating units and related facilities.

8. For lack of knowledge or information sufficient to form a belief as to the truth thereof, Defendants deny the allegations of paragraph 8.

9. Defendants admit the allegations of paragraph 9.

10. For lack of knowledge or information sufficient to form a belief as to the truth thereof, Defendants deny the allegations of paragraph 10.

11. Defendants admit the allegations of paragraph 11.

12. Defendants deny the allegations of paragraph 12.

13. For lack of knowledge or information sufficient to form a belief as to the truth thereof, Defendants deny the allegations of paragraph 13.

14. Defendants deny the allegations of paragraph 14.

15. Defendants deny the allegations of paragraph 15, in part for lack of knowledge or information sufficient to form a belief as to the truth thereof.

16. Defendants deny the allegations of paragraph 16 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

17. Defendants admit the allegations of paragraph 17.

18. In response to the allegations of paragraph 18, Defendants admit that the legislature of New Mexico enacted subsection 9B of the Act, to which reference is made for the correct text. Since paragraph 18 paraphrases subsection 9B, Defendants deny the allegations thereof.

19. In response to the allegations of paragraph 19, Defendants admit that the legislature of New Mexico enacted subsection 9C of the Act, to which reference is made for the correct text. Since paragraph 19 paraphrases subsection 9C, Defendants deny the allegations thereof.

20. Defendants deny the allegations of paragraph 20, except that they admit that a person generating and selling electricity for consumption in New Mexico is entitled to receive either a credit (under subsection 9B) against the gross receipts tax due New Mexico or a reimbursement (under subsection 9C) in an amount equal to the electrical energy tax payable on such electricity.

21. Defendants deny the allegations of paragraph 21 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

22. Defendants deny the allegations of paragraph 22 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

23. Defendants deny the allegations of paragraph 23 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

24. Defendants deny the allegations of paragraph 24 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

25. Defendants deny the allegations of paragraph 25 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

26. Defendants deny the allegations of paragraph 26 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

27. Defendants deny the allegations of paragraph 27 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

28. Defendants deny the allegations of paragraph 28.

29. Defendants deny the allegations of paragraph 29.

30. In response to the allegations of paragraph 30, Defendants admit that Plaintiffs make the legal contentions set forth therein, but deny that any of the contentions is correct.

31. Defendants admit the allegations of paragraph 31.

32. In response to the allegations of paragraph 32, Defendants admit that Section 201 of the Tax Reform Act of 1976 was enacted into law, and deny the remaining allegations for lack of knowledge or information sufficient to form a belief as to the truth thereof.

33. In response to the allegations of paragraph 33, Defendants admit that Plaintiffs make the legal contentions

set forth therein, but deny that any of the contentions is correct.

34. Defendants admit the allegations of paragraph 34.

35. Paragraph 35 sets forth no factual allegations and therefore requires no response.

36. Defendants deny the allegations of paragraph 36.

37. Defendants deny the allegations of paragraph 37.

38. Defendants deny the allegations of paragraph 38.

WHEREFORE, Defendants pray that they have judgment dismissing the first amended complaint, that they recover their costs herein expended and that they have such further relief as the court deems proper.

/s/ JAN UNNA
Jan Unna
Bureau of Revenue
Assistant Attorney General

/s/ DANIEL FRIEDMAN
Daniel Friedman
Bureau of Revenue
Assistant Attorney General

(Certificate of Service omitted in printing)

Defendants' Motion for Summary Judgement

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, *et al., Plaintiffs,*

vs.

FRED O'CHESKEY, *et al., Defendants.*

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Rules of Civil Procedure, Defendants move this Court to enter a summary judgment in Defendants' favor on all issues raised by the First Amended Complaint on the grounds that there is no genuine issue as to any material fact and that Defendants are entitled to such judgment as a matter of law. In support of this motion there are attached hereto the following affidavits:

A. Martin Boughman
B. Graciela Olivarez
C. Cubia Clayton
D. Dan Croy
E. Bruce Nicholson
F. Stephen R. Flance
G. Lee Wilson

Respectfully submitted,

/s/ JAN UNNA
Jan Unna

/s/ DANIEL FRIEDMAN
Daniel Friedman
Attorneys for Defendants
Post Office Box 630
Santa Fe, New Mexico 87503
(505) 827-3221

(Certificate of Service omitted in printing)

Affidavit of Martin L. Baughman

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50425

ARIZONA PUBLIC SERVICE COMPANY, *et al., Plaintiffs,*

vs.

FRED O'CHESKEY, *et al., Defendant.*

AFFIDAVIT OF MARTIN L. BAUGHMAN

Martin L. Baughman, being duly sworn, deposes and says:

1. I am an assistant professor of electrical engineering at the University of Texas in Austin, Texas. My curriculum vitae is attached hereto as Exhibit A. I have extensive training and research experience relating to the mechanics and economics of power generation and transmission as conducted by large utilities in the United States. I am qualified and regarded as an expert in regard to these subjects.

2. The statements in this affidavit and in the exhibit which is attached hereto as Exhibit B are based upon my personal experience, research, and belief and are true to the best of my knowledge. Included in this research are inspections of the Four Corners and San Juan generating plants conducted by me in October, 1976.

3. My conclusions, as set forth and documented more extensively in Exhibit B, are as follows:

a. The generation of electricity is an event which is local to the place in which it occurs and which is separable both mechanically and economically from the transmission and distribution of electricity.

b. The functions and overall purposes of an electric power system and the basic processes of generation, transmission and distribution of electricity have not changed since the early 1900's.

c. The generation of electricity in New Mexico for export to out of state consumers is a growing phenomenon. In 1975 over 60% of the electricity generated in New Mexico was exported. The percentage of exported electricity is considerably higher from the Four Corners and San Juan generating plants in which the Plaintiffs in this action own significant interests. Some 80% of the electricity generated in these plants is exported by the Plaintiffs.

d. In generating electricity in New Mexico for export, the out of state utilities take advantage of the availability of low cost coal resources existing in New Mexico and the economics of high voltage transmission to obtain low cost electrical energy for their consumers. Without the low cost electricity exported from New Mexico, the Plaintiffs would have to increase their reliance on generating plants incurring significantly higher fuel costs. If New Mexico electricity were unavailable to the Plaintiffs, and they had to generate the equivalent amount of electricity at their plants outside New Mexico, their costs would increase by a minimum of one hundred and twenty four million dollars a year.

e. The process of generation in New Mexico accounts for 25% of the Plaintiffs' delivered costs relative to electricity exported from New Mexico. Taxes paid to all collecting jurisdictions in New Mexico account for 7% of the cost of generation, excluding the Electrical Energy Tax Act. Inclusion of the electrical energy tax would raise the taxes paid to all collecting jurisdictions in New Mexico to a maximum 12% of the cost of generation. This compares favorably with the rate of taxes paid by Plaintiffs to all taxing jurisdictions within and without New Mexico on their total revenues from generating, transmitting and distributing electricity, which averages 15% of the total cost experienced by the Plaintiffs. Thus, in proportion to the value of the services performed in the state, New Mexico has re-

ceived less in taxes than other governmental jurisdictions, and collection of the electrical energy tax will only partially correct the disparity.

f. Expressed as a percentage of the average retail price of the electricity generated by Plaintiffs in New Mexico, the Electrical Energy Tax is imposed at a rate of less than two percent.

/s/ Martin L. Baughman
Martin L. Baughman

Subscribed and sworn to before me this 7th day of December, 1976.

/s/ Hellen Mitchell
Notary Public

My Commission Expires:

June 1, 1977

Affidavit of Graciela Olivarez

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

Arizona Public Service Company, El Paso Electric Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, and Tucson Gas & Electric Company, *Plaintiffs*,

vs.

Fred O'Cheskey, Commissioner of Revenue, Bureau of Revenue, and State of New Mexico, *Defendants*.

State of New Mexico, County of Santa Fe, ss.

Graciela Olivarez, being first duly sworn, upon her oath, deposes and says:

1. That she is the State Planning Officer, State of New Mexico, and as such she is authorized to make this Affidavit, and that statements herein are made upon her personal knowledge and belief.

2. The defendants in this proceeding are Fred O'Cheskey, Commissioner of Revenue, Bureau of Revenue, and State of New Mexico.

3. The State Planning Office is an Executive Office of the State of New Mexico.

4. Energy development in the Four Corners area of New Mexico incurs significant negative environmental and social impacts on the area. The burden of alleviating these impacts result in significant costs. These costs are legitimate and they must be paid.

5. From all social and economic indicators, the northwest corner of New Mexico is experiencing rapid economic and population growth. The capacity of the public sector to provide adequate facilities and services is being severely

strained. Potential exists that "boom" conditions may quickly become evident.

6. Negative results of this rapid growth are evident in the deterioration of environmental quality, social problems, and general lowering of the quality of life.

7. At the same time, energy consumers in Arizona, California, and Texas enjoy the benefits of clean and relatively cheap electricity transmitted from generating facilities in San Juan County, New Mexico.

8. Particulate and other emissions from powerplants are degrading New Mexico's clean air and costing us several million dollars per year.

9. Loss of visibility is impairing the aesthetic quality of major landmarks in the area. Coal stripmining is carried on while reclamation techniques remain uncertain. There is no assurance that the thousands of acres mined can ever be revegetated due to limited precipitation in the mining area. This potential inability to reclaim the land will further contribute to the negative visual impact and to particulate pollution of the air.

10. The State also sustains a loss of water quality. Utilization of increasing amounts of water from the San Juan River could increase the salinity of the river. Return water from sewage treatment plants, septic systems, and industrial activity contribute to contamination of water quality in the San Juan River.

11. Industrialization of northwest New Mexico is creating jobs, many of which will be filled by persons attracted to the area by the promise of employment. Rapid population growth creates a demand for services and facilities which quickly outstrips a community's ability to respond. For example, water and sewer systems in the Communities of Farmington, Bloomfield, and Aztec are operating at or near capacity. Needed State and Federal access roads, serving San Juan County, require major expansion and up-

grading. Housing shortages have reached a critical level. The incidence of serious crime such as homicide and aggravated assault was well above the State average in 1974 and 1975. As noted in the State Plan for Mental Health Services, 19766-77, a rise in social and mental health problems can be anticipated in the area.

12. To mitigate the negative impacts of rapid growth, the public sector must have adequate tax revenues to insure environmental quality and provide community infrastructure and services. However, the State of New Mexico is not in a position to shoulder the total burden of these costs; nor should it be the State's unique responsibility.

Industries and consumers that benefit from resource exploitation in the Four Corners area must also be prepared to help offset the negative costs of growth impacts.

/s/ Graciela Olivarez
Graciela Olivarez

Subscribed and Sworn to before me this 23rd day of November, 1976.

/s/ Patricia D. Sanchez
Patricia D. Sanchez

My commission expires:

November 10, 1978

Affidavit of Cubia L. Clayton

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50425

ARIZONA PUBLIC SERVICE COMPANY, *et al., Plaintiffs,*

vs.

FRED O'CHESKEY, *Defendant.*

AFFIDAVIT OF CUBIA L. CLAYTON

I. Cubia L. Clayton being duly sworn state:

(1) I am Deputy Director of the New Mexico Environmental Improvement Agency. I have been employed by the New Mexico Environmental Improvement Agency since April of 1971 in various capacities including Environmental Scientist III, Program Manager for Regulation and Standards Development and Division Chief of the Air Quality Control Division. Prior to 1971, I was employed by the City of Albuquerque, Environmental Health Department, for eight years and the University of Minnesota, University Health Services, for a year and a half. I have a Bachelor of Science degree with a major in Biology from the New Mexico State University and a Masters of Public Health with a major in Environmental Sciences from the University of Minnesota.*

(2) The air pollution caused by electric power generation at the Four Corners and San Juan plants has had a significantly adverse impact on visibility in the Four Corners area of New Mexico. New Mexico vistas historically

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* The statements made here are based on my experience, knowledge and belief and are supported by and referenced in an affidavit submitted separately by Lee Wilson.

have been known for their depth, clarity and color quality, particularly in the northern part of the state. These exceptional vistas have been important in the quality of life enjoyed by New Mexicans and in the promotion of tourism and movie production for the state. Emissions of particulates, sulfur dioxide, and oxides of nitrogen from the San Juan County power plants, primarily the Four Corners generating station at present amount to approximately one quarter billion pounds per year, and have been greater in the past. These emissions have resulted in reduced visual range, less atmospheric clarity, increased frequency of hazy conditions. Studies conducted at New Mexico State University have shown that the reduced visibility represents a cost borne by citizens and visitors in the impacted area. This cost is conservatively estimated to exceed five million dollars per year from the Four Corners generating station alone.

(3) There is the possibility that significant long-term health hazards could occur as the result of air pollution from coal-fired power plants, even though air quality near the plants may meet existing air quality standards. This is so because of the fact that present standards do not address the effect of many pollutants, including toxic or cancer-causing substances such as heavy metals and radioactive materials. Neither do the standards reflect possible interactive (synergistic) effects of different contaminants, nor that the uncontrolled emissions from a power plant are dominantly fine particles which may be relatively enriched in hazardous substances. Health problems resulting from long-term, low-level exposure to such substances may not appear for many years.

An additional factor is the comparatively large number of New Mexico residents who are sensitive to air pollution. Further, the high altitude of the state may exaggerate health impacts because of decreased oxygen supplies. Under such conditions, prolonged exposure of sensitive individuals

to pollutants in concentrations lower than the standards could be deleterious to public health. A significant portion of the burden of investigating such potential health effects, and of remedying them should they occur, falls upon state government.

(4) Strip-mines and transmission corridors significantly impact the aesthetic quality of northwestern New Mexico. These impacts could involve an environmental cost valued at more than seven million dollars per year. The mining impact is total on a local, short-term basis; because of climate, soils and other factors complete recovery of the landscape may require decades or centuries. The impact of transmission lines is most noticeable in areas where no previous human intrusions were found.

(5) The development of coal-fired power plants in San Juan County has led or may lead to environmental stresses and problems additional to those already discussed, and thus to added direct and indirect environmental costs. Many examples can be noted.

Energy-related growth in the Four Corners area results in increased demands for community facilities and services, increased needs for regional facilities and increased social disruption and stress.

Growth in the Kirtland-Fruitland area increases the amount of sewage which is disposed of by septic tanks in the San Juan Valley, where the water table is often near the surface. The likely contamination which results will intensify the need for proper sewage collection and treatment facilities.

The existing allocations of water for the Four Corners and San Juan plants account for a share of the costs associated with potential future water shortages in New Mexico. Such costs could include benefits lost if water supplies limit coal gasification, since gasification provides four times

as much labor income per unit water used as does electrical energy generation.

Erosion and blowing dust may result from land disruption at and near power plants, mines, transmission corridors and access roads.

Significant impacts on vegetation and wildlife will occur in the Farmington area as the result of population growth induced by energy development, resulting in the decline or elimination of game populations, such as antelope and deer.

It is possible that air pollution from power production could lead to weather modification in New Mexico, possibly including a reduction in precipitation and/or solar radiation.

Depletion or degradation of New Mexico's mineral, water, air, biological and other resources for electricity generation could conflict with long-term efficient use of these resources, since alternate methods may be more effective in producing energy, yet may cause less environmental impact.

The cumulative impacts of energy development in northwestern New Mexico may be greater in combination than the sum of the individual project impacts. Thus the effects of the two power plants in San Juan County could, through interaction with other projects, exceed those discussed here.

(6) The environmental impacts cited in the previous sections of this affidavit represent an environmental cost of electrical energy generation, a cost borne to a large degree by citizens of and visitors to New Mexico. Many of the benefits which might otherwise offset this cost, that is the economic and social benefits of energy use, occur in urban centers of Arizona, California, and Texas, far removed from the environmental stresses associated with energy production.

While no detailed benefit-cost analysis can be made regarding electricity generation in the Four Corners area, it is apparent that a regional imbalance occurs which favors consumers who are physically separated from the region in which environmental damage costs are concentrated. This imbalance appears inevitable if the state's resources are to be used to provide the energy supplies needed in other states.

To help redress the balance, those who consume New Mexico's coal must help bear the total production cost, including the indirect costs associated with environmental damage. One measure adopted by the state for recovering such costs is to obtain tax revenues on energy resources exported to other states. Such revenues represent the outcome of a logical policy designed to more equitably share the burdens of energy production. These revenues should help offset the environmental discrimination which is inherent in the export of energy.

/s/ CUBIA L. CLAYTON
Cubia L. Clayton

Subscribed and sworn to before me this 1st day of December, 1976.

/s/ RUTH A. BARRERAS
Notary Public

My Commission Expires 4-17-78.

Affidavit of Dan Croy, M.D.

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

Dan Croy, M.D., being first duly sworn, upon his oath, deposes and says;

1. That he is the Secretary of the Department of Hospitals and Institutions, State of New Mexico, and a member of the Governor's Energy Impact Task Force and as such he is authorized to make this Affidavit, and that statements herein are made upon his personal information and belief.

2. The Department of Hospitals and Institutions is the designated Mental Health Authority for the State of New Mexico.

3. It is reported to me that rapid population growth resulting from energy development and industrialization in the Four Corners Area has been accompanied by an increase in social and mental health problems in San Juan County, New Mexico.

4. Also, I have been informed that other growth impacted communities have experienced similar problems;

that in Sweetwater County, Wyoming, an increase of 100% in the population of the County between 1960 and 1974 was accompanied by a 1000% increase in the number of alcoholism and mental health cases; that case incidence increased in the population already living in the County before the energy boom occurred; it was not confined to the new or transient employees and their families.

5. In opinion the reason this caseload increases in growth impacted areas is complex, but can be partially explained through a focus on the family and its relationship to the community in which the family resides. In a stable community, the family develops many social and recreational relationships, with many alternatives available which have been developed over the years to serve a relatively stable population. The family has help with child raising from youth organizations, and organized after-school or church activities. Wives can seek work if their household duties are not sufficiently challenging, or devote time as volunteers in a variety of public service projects, self-improvement activities, and the like.

6. Further explanations, in my opinion, are because it is reported that residents of communities undergoing rapid population growth frequently live in poorly planned trailer villages or in mobile homes located on the fringe or urban settlements; that there are few jobs for women in construction work, and service-related employment grows more slowly than employment in the energy and construction work sector; that development of social and recreational facilities, such as parks and recreation centers, lag far behind the population; that the mobile home family is a stranger to the community, and finds itself in a strange environment with few supports available; that the father may work overtime, increasing his absence from the home, and consequently, the wife finds herself under considerable stress, lonely and feeling both bored and burdened, her stress thus increasing the stresses experienced by the husband and children; the result is often emotional crises and fights in the family, and/or family members seeking reduction of distress through alcohol and/or other drugs.

7. To continue; as stress in the home environment increases, it negatively affects the productivity of the father at work. As reported from Sweetwater County, when the prevalence of mental health and alcoholism problems in the County increased, industrial per worker productivity dropped by 20 to 40 per cent in the mines; employee turnover rose sharply, as did accident rates in the mines. Emotionally upset workers, preoccupied or worried over family problems, do not make efficient or safe workers.

8. The impact of rapid population growth on native residents of a community comes through the speeded-up pace of life, the experience of congestion and crowding, inflation in prices, and a general fear of change as the newcomers begin voting and running for office, often manifesting very foreign ideas about what should be done compared to the traditional political system's platform over the years prior to the boom. Change and a more frustrating environment produce stress, which can manifest itself in attempts to cope through drug and alcohol abuse, or through other mental health problem symptoms.

9. There have been successful approaches to dealing with these problems, but they have involved expenditure of funds. For example, in Gillette, Wyoming, it is reported that a $1 million recreational/activity center was constructed to provide a variety of recreational, educational, and child-rearing services to both wives or offspring. In that center, and in Sweetwater County, emphasis has been placed on recruiting and training wives of construction and mining employees to work as volunteers in various human services programs, thus solving two problems at once for small cost (compared to hiring professional human services workers to deliver services). To use this technique, however, required that service programs exist and have

the facilities and staff to train, house, and supervise the volunteer workers; that telephone referral services and other forms of public information to be active; and that more intensive intervention services be available to those patients who need detoxification, medication, hospitalization, and other forms of care.

10. The San Juan County mental health center, San Juan County Mental Health Services, Inc. is currently operating at capacity, according to data furnished to me.

11. If per capita expenditures for mental health services in San Juan County were increased by 1169% to $3.60 per capita, as the Department of Hospitals and Institutions will propose to the 1977 New Mexico Legislature, mental health service expenditures in San Juan County would reach only the 20th percentile for the average of such expenditures nationwide in 1974.

12. Thus there is a dire need for expansion of mental health services in the growth-impacted Four Corners area of New Mexico and the cost of providing these services adequately will place a significant burden upon the resources of the State.

/s/ DAN CROY
Dan Croy

SUBSCRIBED AND SWORN to before me this 29th day of November, 1976.

/s/ ILLEGIBLE

My commission expires: 5/7/78

Affidavit of Bruce R. Nicholson

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

AFFIDAVIT

BRUCE R. NICHOLSON, being duly sworn, upon oath, deposes and states as follows:

1. That he is over the age of 21 years and not a party to this action;

2. That he has a Bachelor of Science degree from Case Institute of Technology and a Master of Science degree from Purdue University, and has successfully completed two (2) courses offered by the United States Environmental Protection Agency dealing with air pollution meteorology and modeling techniques; and that he is a registered professional engineer in the State of New Mexico;

3. That he has been employed in various jobs both in industry and with the federal government; and he was employed for two (2) years in the Advanced Analysis Section in the Rocketdyne Division of Rockwell International;

4. That he is presently employed by the New Mexico Environmental Improvement Agency as Program Manager of the Meteorology Section and in that capacity is responsible for and performs modeling studies for permits, regulation development, variances, assurances and compliance schedules, and conducts visibility studies;

5. That he has researched the field in visibility and conducted field experimental visibility studies; and has contributed to the Southwest Energy Study subgroup on aesthetics in relation to visibility and presented a paper to the Air Pollution, Turbulence and Diffusion Symposium on visibility and has presented testimony as an expert witness

before the New Mexico Environmental Improvement Board on visibility effects;

6. That present emissions and future emissions from the Four Corners plant, San Juan power plant, and gasification facilities will have a significant impact upon visibility reduction both in the immediate region of the San Juan basin and also in distant, more populated areas outside of the Basin such as the Rio Grande Valley. This impact is currently the result of the Four Corners generating plant. This impact will be a decrease in visual range when viewing an area affected by the plume from the power plants; a decrease in the background visual range; and a decrease in the frequency of exceptional visual range; and an increase in the number of fine particulates in the air which produces a general widespread haze. That the estimates referenced are not conservative since the composition and size distribution were generally ignored. This means that future emission levels used in the references underpredict the adverse impact on visibility. That the qualitative effects of a reduction in visibility are to wash out colors; prevent the detection of terrain features: produce a general haze, and finally result in the terrain features looking gray. Finally, that NO_2 in sufficiently large concentrations or at low particulate concentrations, will produce a brownish color most commonly associated with urban smog.

7. The background visual range in and about New Mexico often exceeds 100 miles and has been observed to exceed 100 miles in the San Juan basin (Ref. Q & S). In the Santa Fe area during summer measurements, the visual range exceeded 100 miles and averaged 75 miles. (Ref. Q). Since this area has no major sources of particulate emissions and those that exist (travel on unpaved roads) are similar in most areas of the state, it can be concluded that background visual ranges in excess of 75 miles were common in the San

Juan basin prior to the introduction of power plants and that background visual ranges can still be considered to be near those values. It can also be concluded that the frequency of days with visual ranges greater than 100 miles was higher prior to the installation and operation of the Four Corners and San Juan power plants.

8. The qualitative effects of decreasing visual range are a loss of visual clarity; a decrease in color contrasts and descrimination; a mixing of white with the colors which reduces the colors finally to gray. As the visual range decreases, the ability to distinguish details of distant objects decreases (Ref. J). Four (4) color photographs in Ref. "J" attached to this affidavit show these aspects. It is immediately apparent that as the visibility decreases, more "air light" appears. This would commonly be identified as a haze. These four (4) photographs were reproduced from color slides.

9. Emission rates which are presently coming from the Four Corners plant and future emission rates (probably no sooner than 1980-1982) from Four Corners and the San Juan power plants are delineated in Ref. "K". Summarizing these, the present total potential emission rates from the Four Corners plant are 91.7 short tons per day for particulates; 323 tons per day for nitrogen oxides; and 378 tons per day for sulfur oxides. Future legal rates from Four Corners should be 12.8 tons per day of particulates; 182.7 tons per day of nitrogen oxides; 167 tons per day of sulfur oxides. This last figure for sulfur oxides is based upon a 60% removal and not a present legal limit, however, this is somewhat in question since a new regulation is being developed and the exact figure rate is unknown. For the San Juan plant (4 units) the emissions should be 10.3 tons per day of particulates; 102 tons per day of nitrogen oxides and 70 tons per day of sulfur oxides.

10. Several documents have defined the impact on visibility in the San Juan basin (Ref. A, B, F, M, N, Q & R).

Ref. "A" describes the visibility effects with future emission rates after 1977 when present regulations of New Mexico become effective. The emission rates used in the report are lower than presented in the revised report, Ref. "A". The results were endorsed by the power companies who were participants in the report. With future controls there are estimates of up to a totally opaque plume from the Four Corners; San Juan; and gasification facilities. The major contribution was from the Four Corners plant. Other situations produced a 10-50% reduction in visual range for well mixed plumes. Visual ranges down to 30 kilometers (18.7 miles) for the Four Corners plant, 74km (46 miles) for the San Juan plant, 40km (25 miles) for the Wesco gasification facility, and 126km (78.3 miles) for the El Paso gasification facility were determined at a 30km distance from each source. For the San Juan and Four Corners plants combined, the worst visual range was 22-34 km and Wesco and Burnham the visual range was 44-48km. None of these distances would allow their observer to look across San Juan Valley (approximately 61km). This report did not consider stagnation conditions and did not address the effects of NO_2.

Ref. "F" is a report prepared for Arizona Public Service Company and is included as part of the transcript of a public hearing before the New Mexico Environmental Improvement Board, August 15, 1973. It shows that with present emission rates (the particulate rates used in this document are actually 73% of present levels) the visibility (defined as 62 miles) was reduced by 62% to 24 miles. With controls on fly ash at .02 pounds per million Btu's and with 70% SO_2 control of the visual range is reduced by 6-10%. However, the actual fly ash emissions as given in the New Mexico Air Quality Regulations is .05 lbs/million Btu's and SO_2 may be controlled to only 60%. This means a significantly greater reduction in visual range would occur. The report ignored the role of nitrates and NO_2. The estimates given are strictly for ground level site and

not through the plume center line, which has higher particulate concentrations. This also means that stable atmosphere conditions will prove to be the worst case. Additionally, size distribution effects were ignored and the type of particulate were not distinguished when making the estimates. The conclusion is that the impacts will be significantly more severe than stated.

Ref. "M" presents the results of transition and stagnation conditions. The transition case shows that with present emission rates for fly ash and sulfur dioxide and a background visibility of 100 miles, than an observer located 40km down wind of the plant would notice the down wind visibility reduced to 10 miles and looking across the plume, the visibility would be 41 miles. For the stagnation model the 100 miles background visibility would be reduced to 25 miles. This appears to be a reasonable situation considering the results of measurements taken in the San Juan basin (Ref. R). These results are for the Four Corners plant only.

Ref. "N" presents the effects upon visibility for limited mixing conditions for the Four Corners power plant using present emission rates. The two cases show that visual range is reduced by 16 and 54%. These results did not include the affects of sulfates, nitrates or NO_2 which would decrease visual range more than given above.

Ref. "Q" describes measurements performed in various areas of New Mexico. The one test case in the San Juan area showed visual ranges of about 112 miles. This could be described as a background visual range during that test.

Ref. "R" describes visibility measurement tests conducted at the Bureau of Reclamation, Shiprock substation, looking across the river to the Hogback just west of the Four Corners plant. These results showed visual ranges of from 12 to 25 miles. The conditions surrounding the test were of clear skys and a noticeable haze. It was also noted that the winds were calm.

11. Various reports (Ref. E & L) describe the visibility impacts at points outside of the San Juan basin.

Ref. "E" presents results of visibility reductions at distance of 100km from the Four Corners power plant using our current New Mexico Air Quality Regulations, which are .05 lbs/million Btu's for fly ash; 1 lb/million Btu's for SO_2 and .7 lbs/million Btu's for NO_x. These rates are substantially lower than the present emission levels from the Four Corners power plant. At 100km, a 30% reduction in visual range was estimated. This report considered fly ash, sulfates and NO_2 to contribute to the visibility reduction.

Ref. "L" describes possible visual ranges which could be observed in the Espanola Valley using present Four Corners emission rates and a background visibility of 100 miles. A reduction of approximately ⅓ would be observed and the plume would be easily visible. This did not include the effects of sulfates or nitrates. If these were included it would probably prevent one from seeing across the Rio Grande Valley. As seen from Los Alamos there would be a thin gray layer at the very bottom of the valley from local sources followed by a relatively clean layer and then a hazy layer at about 7,000 feet (m.s.l.). This layer would be from 1500 to 3000 feet deep with clear air above it. Exactly this pattern has been observed on occasion in the valley. Data collected by scientists from Los Alamos indicated that significant impairment of visibility could be related to the Four Corners power plant.

12. Ref. "G" treats the general impacts of power plants on visibility. This paper indicates a significant effect on visibility from fly ash, NO_2, sulfates and nitrates. Table I of that report shows measured opacities in the range of from 20% to 90% with a fly ash emission rate of 7-8 tons/day. These opacities were observed at a distance of from 10-30km. Table IV presents the estimated visual ranges, which an observer located 52km from the plant would experience when fly ash and NO_2 are present. The background visual range was 160km and an emission rate of 13 tons/day of fly ash. This table shows significant reductions of the visual range in the blue spectrum. This results in a plume which would have a brownish appearance.

13. Ref. "B" describes the role of particulate size upon visibility reduction. The report indicates that the impact of controls upon fly ash in relation to visibility is marginal since the controls will remove the larger particles, while being less effective in removing the fine particles, which are primarily responsible for the visibility reductions. This report shows significant visibility effects from fly ash, sulfates, nitrates and NO_2. It also documents the importance of particle size upon visibility. It shows that particles in the range of .4 up to 5 microns in diameter are most effective in reducing visibility. It shows the effects of NO_2 in a plume in relation to visual range. Small concentrations can have a marked effect upon color transmission when fly ash levels are reduced.

14. Ref. "C", "D" & "I" deal with the relation between Air Quality Particulate Standards, ground level concentrations and visibility aesthetics. These show that the national primary and secondary Ambient Air Quality Standards, which were adopted in April, 1971, were based upon the Air Quality criteria documents. The particulate criteria document realized that a 150 microgram/cubic meter concentration would reduce the visual range to about 5 miles. Higher levels reduced this range to 3 miles and less. They consider this to be a hazard to airport operations. In New Mexico this is obviously not acceptable considering that natural visual ranges in excess of 100 miles are common. It can be deduced that the national primary and secondary levels for particulates bear no relation to New Mexico visibilities. In addition, pollution from sources such as power plants are released at elevated points from chimneys and the concentrations at ground level often have little relation to reductions in visual range. Plumes from industrial

sources are often observed to be 1000 feet or greater above ground. An observer looking at a distant terrain feature will often bee looking up through the plume when viewing this feature. Thus, even though the plume does not touch the ground and ground level concentrations are quite low, there will be a visual range reduction and a noticeable plume.

/s/ Bruce R. Nicholson, P.E.
Bruce R. Nicholson, P.E.

Subscribed and Sworn to before me this 30th day of November, 1976.

/s/ Dolores Y. Diggins
Notary Public

My Commission Expires: April 1, 1979

Affidavit of Stephen R. Flance

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

Arizona Public Service Company, et al., *Plaintiffs,*

vs.

Fred O'Cheskey, et al., *Defendants.*

Affidavit of Stephen R. Flance

Stephen R. Flance, being duly sworn, deposes and says:

1. I am owner and principal of Stephen R. Flance & Associates, a consulting firm located in Santa Fe, New Mexico. I have conducted studies whose purpose was predicting trends in social and economic development within municipal and county jurisdictions, and estimating the costs to the relevant governmental bodies of developing services responsive to these trends. My curriculum vitae is attached as Exhibit A hereto.

2. I have conducted a study, attached hereto as Exhibit B, to assess the current state of municipal and county services available in San Juan County where the Four Corners and San Juan generating plants are located, to predict population trends in the area, to identify that element of population growth related to the presence and growth of the two generating plants, and to estimate the capital needed by the various governmental entities to provide adequate services to the population generally and to the population related to the two generating plants. The study is based on review and evaluation of many studies concerning the economic development of the Four Corners area and the impact of the generating plants and statistics available from a variety of sources. The facts set out in the

affidavit and in Exhibit B are true to the best of my knowledge, and the opinions expressed by me reflect an accurate assessment of the available data.

3. My conclusions, which are based on information more fully set out and documented in Exhibit B, are as follows:

a. Population trends in San Juan County, resulting in part from the operation and expansion of the San Juan and Four Corners plants as well as the development of additional energy-related industries in the area, are such that the currently estimated population of 65,300 persons in the county may increase to as many as 138,000 persons by 1980.

b. In-migration to San Juan County attributable to the San Juan and Four Corners power plants, and their associated mining interests may range as high at 8,791 persons during the period 1976-1980.

c. Existing infrastructure and services provided by municipal and county government in the Four Corners region are currently utilized either at capacity or close to capacity. In the face of large population increases forecasted during the next five years, major expansion and improvement programs will be required for all affected jurisdictions.

d. The moderate projected population increase may create a demand for as much as $147.6 million in capital outlays over the next 5 years; while under the high population projection as much as $243.8 million may be required to meet this demand. In addition, between $32,922,270 and $38,934,630 may be required in state expenditures to upgrade roads in the region under proposed improvement projects. Furthermore, between $24.4 million and $40.3 million dollars per year may be required to meet the annual recurring costs of local government agencies expanded to accommodate increased populations; while annual costs to

the state are likely to range between $14.3 million and $23.7 million.

e. Capital outlays required to meet the demands of new populations attributable to the Four Corners and San Juan plants are estimated at between $11.7 million and $27.1 million at the present time.

f. The increase in population will create a demand for additional housing which may place a severe strain on the ability of the private sector to supply adequate financing or development. These shortages may inflate the costs of construction and may lead to primary reliance on mobile homes as the response to demand.

g. In developing additional governmental services to respond to an increasing population, the urgent need is for an infusion of "front-end money" to finance expansion before the need becomes critical. The electrical energy tax, with a legislated termination date in 1984, partially alleviates the burden of "front-end" costs impacting the state and communities in San Juan County.

/s/ STEPHEN R. FLANCE
Stephen R. Flance

Subscribed and sworn to before me this 2nd day of December, 1976.

/s/ (ILLEGIBLE)

Notary Public

My Commission Expires: November 13, 1978

Memorandum Opinion

The Memorandum Opinion of the District Court of the First Judicial District, Santa Fe County, New Mexico has been printed as Appendix A to the Jurisdictional Statement.

[993] **Judgement**

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

JUDGMENT

This matter having come on for hearing upon Plaintiffs' Motion for Summary Judgment and Plaintiffs' Supplemental Motion for Summary Judgment and upon Defendants' Motion for Summary Judgment and the Court having considered the pleadings, answers to interrogatories and affidavits and exhibits supporting such motions and the briefs and oral arguments of counsel and being otherwise fully advised in the premises.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the Electrical Energy Tax Act (Chapter 263, Laws 1975) does not violate any provision of the Constitution of the United States or of the Constitution of the State of New Mexico, including any amendments thereto; that the Electrical Energy Tax Act (Chapter 263, Laws 1975) does not violate Section 1322, Title II, Section 201(a) of the Tax Reform Act of 1976 enacted by the Congress of the United States; and that, the parties having stipulated that upon the pleadings, answers to interrogatories and affidavits and exhibits attached thereto that there is no genuine issue as to any material fact herein, plaintiffs' motion for summary judg-

ment and their supplemental motion for summary judgment be and the same hereby are denied and defendants' cross-motion for summary judgment be and the same hereby is granted.

/s/ Edwin L. Felter
Edwin L. Felter
District Judge

Notice of Appeal
(To the Supreme Court of New Mexico)

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO COUNTY OF SANTA FE

No. 50245

Arizona Public Service Company, El Paso Electric Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, and Tucson Gas & Electric Company, *Plaintiffs*,

vs.

Fred O'Cheskey, Commissioner of Revenue, Bureau of Revenue, and State of New Mexico, *Defendants*.

Notice of Appeal

Notice Is Hereby Given that Arizona Public Service Company, El Paso Electric Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company and Tucson Gas & Electric Company, plaintiffs above named, hereby appeal to the Supreme Court of New Mexico from the judgment entered in this action on the 18th day of February, 1977.

Dated this 18th day of March, 1977.

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Attorneys for Plaintiffs

Opinion of Supreme Court of New Mexico

The Opinion of the Supreme Court of New Mexico has been printed as Appendix B to the Jurisdictional Statement.

Notice of Appeal

The Notice of Appeal from the Supreme Court of New Mexico to the Supreme Court of the United States has been printed as Appendix C to the Jurisdictional Statement.

No. 77-1810

IN THE

Supreme Court of the United States

October Term, 1978

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,
Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO,
Appellees.

On Appeal From The Supreme Court of New Mexico

MOTION TO DISMISS OR AFFIRM

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CASES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,

Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO,

Appellees.

On Appeal From The Supreme Court of New Mexico

MOTION TO DISMISS OR AFFIRM

The Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of New Mexico on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Is the New Mexico Electrical Energy Tax Act discriminatory within the meaning of §2121(a) of the Tax Reform Act of 1976 if it subjects all electricity generated in the state to the same tax rate regardless of where it is ultimately sold and if electricity subsequently sold at retail in New Mexico is further subject to the New Mexico Gross Receipts (sales) Tax reduced only by the lesser Electrical Energy Tax already paid?

2. May a state, consistent with the limitations imposed by the Commerce Clause, impose a tax on the generation of electricity occurring within its borders?

3. Does a state tax on the generation of electricity occurring solely within its borders violate the Commerce Clause and the Due Process Clause of the Fourteenth Amendment?

4. Is it a violation of the Import-Export Clause for a state to impose a tax on the generation of electricity occurring solely within its borders?

COUNTER-STATEMENT OF THE CASE

The Four Corners and San Juan generating plants were constructed in the northwest corner of New Mexico to take advantage of an abundant thirty-year coal supply which could be strip-mined there. The availability of coal, one of the least expensive fuels, coupled with the economies of high voltage transmission result in relatively low-cost electrical energy for the consortium of Arizona, California and Texas utilities which participate in the plants and for their consumers. If New Mexico electricity were unavailable to the Appellants, and they had to generate the equivalent amount of electricity at their next-most economical plants outside New Mexico, their costs would

increase by a minimum of 124 million dollars a year (R.792). In contrast, payment of New Mexico's Electrical Energy Tax will cost Appellants about five million dollars a year.

Long-distance transmission permits the Appellants to deliver "clean" energy in Los Angeles and Phoenix while avoiding strictures against coal-burning plants in densely-populated areas. Instead, it is New Mexico which suffers a minimum of twelve million dollars of environmental damage annually from these plants (R.906). Further, the increase in population and related socio-economic problems arising directly from the presence of the generating plants in New Mexico burden state and local governments with twenty-seven million dollars in additional annual costs (R.849).

The rate of taxes paid by Appellants to all taxing jurisdictions within and without New Mexico on their total revenues from generating, transmitting and distributing electricity averages 15% of their total costs (R.793). Taxes paid to all collecting jurisdictions in New Mexico currently account for only 7% of the costs of generation, excluding the Electrical Energy Tax (R.793). Inclusion of the Electrical Energy Tax would raise the taxes paid to all collecting jurisdictions in New Mexico to 12% of the cost of generation (R.793). Thus, in proportion to the value of Appellants' activities in New Mexico, the State has received less in taxes than other governmental jurisdictions, and collection of the Electrical Energy Tax will only partially correct the disparity.

The Electrical Energy Tax is levied at a flat four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico. Expressed as a percentage of the average retail price of the electricity generated by Appellants in New Mexico, the Electrical Energy Tax is imposed at a rate of less than 2% (R.793). As the retail price of electricity increases, as it surely will, the Electrical Energy Tax will represent an increasingly smaller percentage of this price. Contrary

to Appellants' repeated assertions (Juris. Statement 12, 16-17, 21, 22), *every* generator pays the Electrical Energy Tax, regardless of whether the electricity will ultimately be sold in New Mexico or elsewhere, §§72-34-3, 72-34-5, N.M.S.A. 1953 (1975 P.S.).

Electricity sold at retail in New Mexico is also subject to the New Mexico Gross Receipts tax, the equivalent of a sales tax, §§72-16A-3(F), 72-16A-3(I) and 72-16A-4, N.M.S.A. 1953. The Gross Receipts Tax liability is reduced by the amount of Electrical Energy Tax which has already been paid by the generator §72-16A-16.1, N.M.S.A. 1953 (1975 P.S.). The Gross Receipts Tax rate of four percent is more than double the Electrical Energy Tax liability on a unit of electricity. Crediting the latter tax against the amount of the former always leaves a sizable balance to be paid only on electricity sold at retail in New Mexico. Thus all electricity, whether sold within or without New Mexico, is subject to the Electrical Energy Tax at the same rate, equal to less than two percent of the average retail cost. Further, electricity sold within New Mexico is also subject to the New Mexico Gross Receipts Tax, reduced by the Electrical Energy Tax already paid, for a total tax equal to four percent of the retail price.

According to uncontroverted expert evidence in this case, the generation of electricity is an event which is local to the place in which it occurs and which is separable both mechanically and economically from transmission and distribution (R.791-792). This assertion is effectively conceded by Appellants who note that at the time electricity is generated (and the Electrical Energy Tax attaches), "the particular market in which it will be distributed cannot be identified" (Juris. Statement 5).

THIS APPEAL DOES NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS AND SHOULD ACCORDINGLY BE DISMISSED

1. The Settled Case Law Totally Supports The Decision By The Supreme Court Of New Mexico

The sole issue in this appeal which presents any possible novelty is the effect on New Mexico's Electrical Energy Tax Act of Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. §391. This is discussed in detail *infra.* All other issues raised by Appellants are clearly settled in New Mexico's favor under applicable law. Most directly on point, in 1974 this Court dismissed for want of a substantial federal question the appeal in *Public Utility District No. 2 v. State,* upholding a tax strikingly similar to the one challenged here, 82 Wash.2d. 232, 510 P.2d. 206 (1973), appeal dismissed, 414 U.S. 1106 (1974).

The *Public Utility District No. 2* case, *supra,* coupled with *Alaska v. Arctic Maid,* 366 U.S. 111 (1961), *South Carolina Power Company v. South Carolina Tax Commission,* 52 F.2d 515 (E.D.S.C. 1931), *aff'd* 286 U.S. 525 (1932) and *Utah Power & Light Company v. Pfost,* 286 U.S. 165 (1932) establish the following controlling propositions in evaluating the legality of a state tax on the generation of electricity: First, the generation of electricity is a local incident, separable from the process of transmission. Therefore, a tax on generation is not *per se* a forbidden tax on interstate commerce.

Second, in determining whether a particular tax discriminates against interstate commerce, the impact of the entire tax structure of a state on a particular *commodity* is considered, rather than any one tax or taxpayer in isolation. This inquiry stops at the boundaries of the state levying the challenged tax. In other words, if the total taxes levied by a state on a particular commodity are higher for the commodity ultimately sold within the

state than for the commodity ultimately sold outside the state, there is no discrimination.

(Attached hereto as Appendix A is an excerpt from New Mexico's Brief in Opposition in *Arizona v. New Mexico,* 425 U.S. 794 (1976), a case raising the same issues as the present matter. This excerpt discusses the cited cases in detail and may be referred to by the reader, avoiding excessive length in the present brief).

The commodity of electricity is taxed by New Mexico at a flat four-tenths of a mill per kilowatt hour at the point of generation, regardless of whether it will ultimately be sold in New Mexico or elsewhere, §§72-34-3, 72-34-5, N.M.S.A. 1953 (1975 P.S.). Electricity later sold at retail in New Mexico is subject to the full rate of the New Mexico Gross Receipts Tax minus the lesser amount of Electrical Energy Tax which has already been paid, §72-16A-16.1, N.M.S.A. 1953 (1975 P.S.). Effectively, this imposes an additional tax exclusively on electricity sold at retail in New Mexico equal to more than 2% of its retail value. Therefore, New Mexico's tax structure imposes a greater tax burden on electricity generated and sold in New Mexico than on electricity generated in New Mexico and sold elsewhere.

The only basis for any discrimination argument is the credit against Gross Receipts Tax allowed by §72-16A-16.1(B), N.M.S.A. 1953. The obvious purpose of this provision is to collect a tax only once from in-state sellers, not to impose the Electrical Energy Tax in addition to the 4% Gross Receipts Tax. The in-state sale of electricity generated in New Mexico is not exempted; it is taxed, just as the out-of-state electricity is, and at the significantly *higher* rate of 4%. The legislative purpose is no different from that found by the Washington Supreme Court in the case of *Public Utility District No. 2 v. State, supra,* where it sustained a privilege tax on electricity so close to the tax at issue here as to foreclose Appellants' commerce clause contentions in this case.

In rejecting the utilities' claim of discrimination, the Washington Supreme Court stated:

> "The public utility *tax on electrical power* originating in this state *is to be imposed only once* under the Washington taxing scheme. The deduction here at issue permits this singular tax imposition by preventing the pyramiding effect of the public utility tax, which is otherwise certain to occur. The only relevant difference between the present case and *Crown Zellerbach* is that, rather than having an interrelated tax structure (manufacturing-wholesaling) imposed, this case has a shifting tax structure in which singular tax liability exists but shifts to another utility. By so doing, the in-state distribution of the use of power is *not* exempted and is taxed, just as is the out-of-state distribution of power. Equal treatment is the theme of this system. H & B Communications Corp. v. Richland, 79 Wash.2d 312, 484 P.2d 1141 (1971). The out-of-state utility is in no worse position than its in-state competitor. The state is playing no favorite with its resident businesses at the expense of similarly situated out-of-state enterprises.
>
> * * *
>
> "The confusion results, in part, because the respondents look only to their status as complaining public utilities at the time of their sales to in-state or out-of-state purchasers, and not to the impact of the total tax structure on the subject matter here involved, the disposition and use of power. *If the whole tax scheme is evaluated, the tax deduction that is made at the sale to a Washington utility is made up at the time the Washington utility buyer sells to its customers.* Thus, 'In the instant case, there is no burden on interstate commerce that is not placed on intrastate commerce.' H & B Communications Corp. v. Richland, *supra,* 79 Wash.2d at 314, 484 P.2d at 1144. The in-state and out-of-state disposition of power is equally treated. There is tax equivalence here and no discrimination on interstate commerce."

"Judgment reversed." 510 P.2d at 211.

[Emphasis added.]

Similarly, New Mexico's intention with respect to electrical energy generated and sold by utilities in New Mexico is that the transactions be taxed only once. Consequently, the legislature has provided that the Electrical Energy Tax may be credited against the Gross Receipts Tax due on subsequent sales in New Mexico. Obviously, the same result could have been accomplished by imposing the type of tax and deduction sustained in the Washington *Public Utility District No. 2* case. The tax effect is the same in both structures; the difference lies only in the form of the two systems, not in their substance.

Utah Power & Light Company v. Pfost, supra, holds that the generation of electricity is a local activity separable from subsequent interstate transmission. Were this not the case, *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977) and *Dept. of Revenue of the State of Washington v. Ass'n of Washington Stevedoring Companies,* ___U.S. ____, 98 S.Ct. 1388 (1978) permit a state to tax even interstate activities to the full extent of their local occurrence. *Michigan-Wisconsin Pipeline Company v. Calvert,* 347 U.S. 157 (1954) on which Appellants rely (Juris. Statement 3, 21, 22) does not avail them since it specifically distinguishes a tax on the generation of electricity from the gas transmission tax which was struck down there, at 168.

Appellants assert that generators which sell their electricity at retail in New Mexico do not pay the Electrical Energy Tax and further claim that the tax is actually on the transmission of electricity, not its generation. As explained in the Statement of the Case herein, *every* generator pays the Electrical Energy Tax, regardless of whether the electricity will ultimately be sold in New Mexico or elsewhere, §§72-34-3, 72-34-5, N.M.S.A. 1953 (1975 P.S.). Furthermore, the tax is clearly on the activity of generation, an event which is local to the place in which it

occurs and which is separable both mechanically and economically from transmission and distribution, *Utah Power & Light Company v. Pfost, supra.* Indeed, Appellants concede that at the time the Electrical Energy Tax attaches, "the particular market in which it [electricity] will be distributed cannot be identified" (Juris. Statement 5).

Appellants further assert that the allegedly discriminatory nature of the Electrical Energy Tax is particularly evident when "generator-wholesalers" (i.e., generators which sell their electricity to other utilities for sale at retail) are examined in isolation (Juris. Statement 7, 19). It is hard to see why special significance is attached to wholesale transactions. As explained earlier, *every* generator pays the Electrical Energy Tax regardless of whether the electricity is ultimately sold in New Mexico or elsewhere. Furthermore, *no* generator of electricity which sells at wholesale is subject to the New Mexico Gross Receipts Tax, the equivalent of the state sales tax (Juris. Statement 7).

The contention that the Electrical Energy Tax places Appellants at a competitive disadvantage with New Mexico utilities (Juris. Statement 17) is unsupported by any substantial evidence in the record that such competition takes place, that it is of any significant magnitude, or that Appellants are actually disadvantaged.

2. The Electrical Energy Tax Act Does Not Violate §2121(a) Of The Tax Reform Act Of 1976, 15 U.S.C. §391

Section 2121(a) of the Tax Reform Act of 1976 provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers,

> or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

Appellants presumably contend that this section establishes a new test of what constitutes a discriminatory tax on the generation of electricity, different from the test established by the case law discussed in the preceding section under which the Electrical Energy Tax would be sustained. However, no new test is discernible since §2121(a) unambiguously preserves the two fundamental propositions from the case law – that generation is a *local event* and that one looks to a state's *entire tax structure* as applied to a given *commodity* in determining whether a particular tax is discriminatory. The section by its clear wording does not invalidate New Mexico's Electrical Energy Tax Act. The innocuous nature of the statute was highlighted when its sponsor, Senator Fannin, assured the Senate that it would not invalidate Washington's utility tax, closely analogous to New Mexico's, 122 Cong. Rec. S12714 (daily ed. July 28, 1976).

The operative test of a discriminatory tax under §2121(a) is whether

> it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

The Electrical Energy Tax does not "directly" place a greater burden on electricity destined for out-of-state transmission. Both New Mexico utilities and out-of-state utilities pay the same generating tax at the same rate. Section 72-34-3, N.M.S.A. 1953.

In determining whether the Electrical Energy Tax "indirectly" results in a greater burden on out-of-state electricity, §2121(a) affirmatively preserves the test found in the *Public Utility District No. 2* case, *supra*: in determining the effect of a tax, one looks at the *entire tax structure* of a state as applied to the *particular commodity* which is taxed. Thus, the statute directs us to look at the "tax burden on *electricity*", not the tax burden on generation. There is no limitation as to which state taxes are to be scrutinized in deciding whether a "greater tax burden" has resulted. Obviously, in looking for "indirect" burdens as the section commands, one must of necessity consider all taxes which a state levies on electricity. In the instant case, the pertinent tax is the Gross Receipts (sales) Tax which, although reduced by the amount of the Electrical Energy Tax, continues to impose a burden on electricity sold in New Mexico from which electricity sold out-of-state is exempted.

Appellants contend that the reduction of the New Mexico sales tax on electricity proportionate to the Electrical Energy Tax paid on the same commodity causes a "greater tax burden" on electricity sold out-of-state than on electricity sold in New Mexico. But they misread the section's language: as the dictionary makes clear, the word "greater" means "larger", not "additional".*

The test of discrimination under §2121(a) is not whether a tax imposes an *additional* burden on out-of-state electricity compared to the situation prior to passage of the tax. Rather, the test is whether a generation tax results in a *larger* total tax

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* GREAT, a.; *comp.* greater; *superl.* greatest. [AS. *great*, great, large.] 1. Large in bulk or dimensions; to extended length or breadth; of large number; as, a *great* multitude. . . .

ADDITIONAL, *a.* Supplemental; added; increased or increasing in any manner.

New Twentieth Century Dictionary unabridged, The Publishers Guild, New York (1943).

on each unit of electricity sent out of New Mexico than the total tax on each unit of electricity consumed in New Mexico. Even with the reduction in the in-state sales tax, the amount of Electrical Energy Tax paid by in-state producers coupled with the remaining liability for the in-state sales tax exacts a "greater" [larger] tax on electricity destined for in-state consumption.

As noted earlier, the rate of the Electrical Energy Tax equals less than two percent of the average retail value of the electricity that is generated (R.793). Therefore, utilities selling out-of-state pay the two percent Electrical Energy Tax and utilities selling in New Mexico pay the two percent Electrical Energy Tax. The in-state retail sale of electricity gives rise to a sales tax at the effective rate of an additional two percent above the Electrical Energy Tax (i.e., the four percent Gross Receipts Tax, reduced by the amount already paid as Electrical Energy Tax). Thus, while the utility selling out-of-state is paying an additional tax that it was not previously required to pay, payment of this tax does not result in a "*greater*" [larger] burden on the electricity transmitted out-of-state.

Appellants apparently assume that because New Mexicans have been paying a 4% tax on electricity all along, the imposition of a 2% tax on electricity sold out-of-state results in a "greater" burden on out-of-state than on in-state electricity. This is not the case. There is now an *additional* tax on out-of-state electricity that was not there before, but the tax burden is still well below the in-state burden on electricity, and is not forbidden by §2121(a).

This Court has said on numerous occasions that its duty is to look at the particular effect of a tax structure, not the labels which a legislature affixes to its tax laws, *Stewart Dry Goods Company v. Lewis,* 294 U.S. 550, 55 S.Ct. 525 (1934). For example, in *City of Detroit v. Murray Corporation,* 355 U.S. 489 (1957), this Court recognized that a tax labeled a "property" tax was really a tax on the use of the property and

therefore did not constitute a forbidden tax on United States property.

> . . . in passing on the constitutionality of a state tax "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." [cite omitted] . . . we must look through form and behind labels to substance. This is at least as true to uphold a state tax as to strike one down.
>
> *Id.* at 492.

In the instant case, New Mexico has chosen to reduce its sales tax on electricity. To do so does not "indirectly" place a larger burden on electricity sold out-of-state than on electricity sold in New Mexico. The latter is still saddled with a greater tax burden.

A second reason why §2121(a) does not invalidate New Mexico's tax is that it only forbids imposing a greater tax burden on "electricity which is generated. . . in interstate commerce than on electricity which is generated . . . in intrastate commerce". All the generation activities which New Mexico taxes, including generation by the Appellants, are solely in *intrastate* commerce and outside the purview of §2121(a).

Section 2121(a) does not identify the circumstances in which electricity might be "generated . . . in interstate commerce". Neither the section nor its legislative history contains any finding that the generation of electricity is ever in interstate commerce. This may be contrasted with the earlier version of the statute approved by the Senate Finance Committee and passed by the Senate (but later revised in the Senate-House conference) which explicitly dealt with "the generation of electricity *for* transmission in interstate commerce", see Appendix B, emphasis added, and discussion in Section 3 of this brief, *infra.*

Utah Power & Light Company v. Pfost, supra, held that electricity generated as the utilities here generate in New Mexico

is a local incident outside of interstate commerce. Uncontested evidence in this case establishes that the electricity at issue here is generated in intrastate commerce (R.791-792). Appellants themselves concede that prior to the time that New Mexico energy is transformed for transmission, the market in which energy will be distributed cannot be identified, (Juris. Statement 5). Section 2121 does not bar a tax on the electricity which Appellants generate in New Mexico because it is generated solely in *intra*state commerce.

3. The Legislative History Cited By Appellants Concerns A Test Of Discrimination Other Than The One Ultimately Enacted In §2121(a). It May Properly Be Ignored.

Appellants contend that whatever the infirmities of language in §2121, the legislative history indicates congressional intent that its test of discrimination was meant to outlaw New Mexico's Electrical Energy Tax. Looking at the meager legislative history on which Appellants rely, we find that it deals with a totally different test of discrimination from that which was ultimately passed. Senator Fannin first proposed a measure to ban the Electrical Energy Tax in the Senate. This bill was sent to the Senate Finance Committee which issued its report analyzing and approving the provision, S. Rep. No. 94-938-Part I, 94th Cong., 2d Sess. 437-438 (1976), as reported in 1976 U.S. Code Cong. & Ad. News 3865-66. The bill approved by the Senate Finance Committee is reproduced in Appendix B herein (R. 1, 031). The amendment proposed by Senator Domenici (Juris. Statement 14) sought to strike the bill as approved by the Senate Finance Committee, 122 Cong. Rec. S12712 *et seq.* (daily ed. July 28, 1976). The Senate later passed the bill approved by the Senate Finance Committee, 122 Cong. Rec. D1093 (daily ed. Aug. 6, 1976).

However, subsequent to Senate passage, the sponsors of the bill decided to make it part of the Tax Reform Act package and

requested a conference of the House, 122 Cong. Rec. D1094 (daily ed. Aug. 6, 1976). The Senate measure then went to a House-Senate Conference Committee. 122 Cong. Rec. D1144 (daily ed. Aug. 25, 1976), which discarded the Senate bill's test of a discriminatory tax and devised a new test. This new test is the one which was ultimately passed by both the Senate and the House in the Tax Reform Act of 1976 and signed into law by the President.

The differences between the test of discrimination which the Senate Finance Committee report discusses and the test actually enacted are quite significant. As stated by Arizona Public Service's own counsel who drafted them for Senator Fannin, the differences were "critical", R.701-702, reproduced as Appendix C herein.

The Senate Finance Committee had made the test "payment of a higher gross or net tax", an approach which focussed on the effect of a single tax, – the generation tax –, rather than focussing on the total "tax burden" on the electricity, see Appendix B. The evidence in the record in this case indicates that the test approved by the Finance Committee was deleted to appease West Virginia whose generation tax was threatened, see Appendix C.

While no rule of law forbids resort to legislative history as an aid to construction of a statute, *Train v. Colorado Public Interest Research Group,* 426 U.S. 1, 10, 96 S.Ct. 1938 (1975), this Court has declined to do so where a statute was unambiguous on its face and particularly where the legislative history created doubt rather than resolving it, *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Company,* 257 U.S. 563, 42 S.Ct. 232, 238 (1922); *Packard Motor Car Company v. National Labor Relations Board,* 330 U.S. 485, 67 S.Ct. 789 (1947); *United States v. Oregon,* 366 U.S. 643, 81 S.Ct. 1278 (1961). In the instant case, §2121(a) gives no clue that a reduction in New Mexico's sales tax on electricity equal to its universally-

applied tax on generation would run afoul of its provisions. The inconsonance between the supposedly pertinent legislative history and the statute as passed is readily explained by the change in the test of discrimination subsequent to the preparation of the Senate Finance Committee report.

The difference between the original bill and the enacted statute is more than a matter of changing a few words. What was changed was the basic test of discrimination, the entire point of the statute. That the test was changed is evident: the enacted statute preserved West Virginia's generation tax; the Senate Finance Committee's bill did not, see Appendix C. Ironically, the need to placate all the other states having generation taxes took the drafters full-circle, resulting in a statute which simply codified the existing case law. As noted earlier, this case law amply sustains the New Mexico tax. Whether this result was intended or not, it is hardly accurate to say it renders the statute "essentially meaningless", (Juris. Statement 15).

As noted earlier, the bill's sponsor advised the Senate that even under the Senate Finance Committee version, Washington's utility tax would not be invalidated, 122 Cong. Rec. S12714 (daily ed. July 28, 1976). Since the Washington tax, upheld in the *Public Utility District No. 2* case, *supra*, is closely analogous to New Mexico's tax, whether even the Senate Finance Committee version would have banned New Mexico's tax is problematic.

The plain fact is that Appellants set out to accomplish an impossible task. They wished to steer a bill through Congress which would outlaw New Mexico's tax but no other state's. Otherwise it could not pass. They attempted to accomplish this end by securing passage of an essentially innocuous statute and placing the "teeth" of the statute in the legislative history. Indeed, all other states were assured that "[t]his provision is not intended to prohibit . . . any other State which currently imposes a nondiscriminatory tax on the generation of electricity",

S. Rep. No. 94-938-Part I, 94th Cong., 2d Sess. (1976), *supra*. Because the initial version of the bill was still not sufficiently innocuous, Appellants lost the opportunity to create the clear legislative history that they had hoped for, see Appendix C herein. The available legislative history may properly be ignored.

4. Assuming *Arguendo* That The Electrical Energy Tax Act Is "Discriminatory" Within The Meaning Of §2121(a) Of The Tax Reform Act Of 1976, §2121(a) Would Be Unconstitutional. The Section Should Not Be Construed So As To Render It Unconstitutional.

While there is a strong presumption as to the validity of Congressional enactments relating to interstate commerce, the presumption is rebuttable, *United States v. Butler*, 296 U.S. 156, 56 S.Ct. 312 (1936). This is true even where Congress has determined for itself that a given condition is harmful to interstate commerce, *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377 (1964). The test of the limits of Congressional power are whether a rational basis exists for a finding that a given condition burdens interstate commerce and whether the means Congress selects to eliminate the particular evil are reasonable and appropriate, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

In the instant case, Congress has banned discriminatory taxation of generation by utilities selling at retail outside the state of generation. Since it is undisputed that the commodity of electricity is taxed by New Mexico at a total rate of 4% when sold in New Mexico and is taxed at a rate less than 2% when it is sold outside New Mexico, the only possible defect in New Mexico's tax scheme is the provision permitting the Electrical Energy Tax to be credited against any Gross Receipts Tax liability. Indeed, Appellants' construction of §2121(a) hinges entirely on that portion of the Senate Finance Committee

report which identifies the credit provision as the defect in New Mexico's scheme (Juris. Statement 13-14).

Appellants' interpretation of §2121(a) would void New Mexico's Electrical Energy Tax while leaving intact other hypothetical tax schemes *which achieve exactly the same results* but without use of the supposedly forbidden credit provision. Examples are set out in the following paragraph. Such an interpretation would render §2121(a) an unreasonable and inappropriate response to the problem of discrimination it confronts and therefore, under the test in *Heart of Atlanta Motel, supra,* an enactment exceeding Congress' powers to regulate interstate commerce. Since it is a court's duty to avoid constructions which render a statute unconstitutional, *United States v. Rumely,* 345 U.S. 41, 73 S.Ct. 543 (1953), Appellant's interpretation of §2121(a) should be rejected.

Many equivalent tax schemes would easily avoid use of a credit provision but safely exact the same or even higher taxes from Appellants. If New Mexico levied its four-tenths of a mill generation tax as it does now, but exempted electricity entirely from its Gross Receipts Tax, the credit provision would be entirely eliminated and the generation tax would be valid under §2121(a). Appellants would pay the same tax they pay now. Similarly, if New Mexico levied the same tax on generation as it does now, but subjected retail sales of electricity in New Mexico to a flat 2% Gross Receipts Tax, the credit provision would also be eliminated. Again, Appellants would pay the same tax they pay now. Finally, if New Mexico levied a generation tax at an effective rate of *four* percent instead of 2% and eliminated retail sales of electricity from the Gross Receipts Tax entirely, the arrangement would again satisfy §2121(a) yet would place Appellants in a far worse position than they are in now.

To say that *total elimination* of New Mexico's tax on retail sales of electricity would satisfy §2121(a) while a *reduction* of

that tax through a credit provision does not, is an absurd construction of the Federal statute. Whether and how New Mexico reduces or eliminates a tax which Appellants have never been required to pay cannot be the controlling test. This unreasonable, and therefore constitutionally impermissible, construction of §2121(a) should be avoided by ignoring the proffered legislative history as inapplicable and by holding New Mexico's Electrical Energy Tax lawful within the test of §2121(a).

5. The Electrical Energy Tax Does Not Impose A Cumulative Burden On Interstate Commerce

Appellants' contention that the generation tax imposes multiple burdens on interstate commerce is premised on the notion that the Electrical Energy Tax is a tax on interstate commerce. This is incorrect, see *Utah Power & Light v. Pfost, supra.* A tax prospectively burdens interstate commerce only if every state which has a connection with that commerce could levy a tax on the same subject, measured on the same basis. See generally, *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250 (1938). Appellants can make no such showing because the entire taxable incident occurs solely within New Mexico. No other state may tax generation occurring in this state and there is no possibility of the duplication of this tax.

6. The Electrical Energy Tax Is Not An Unlawful "Extension" Of New Mexico's Taxing Power And Is Not Violative Of The Due Process Clause Of The Fourteenth Amendment

Appellants' argument here is based on two propositions: the Electrical Energy Tax is upon interstate commerce, and certain New Mexico legislators who were instrumental in passing the tax had an unlawful purpose in mind. The first proposition is incorrect for reasons stated earlier in this brief. As to the second,

even assuming that individual members of the Legislature *intended* to burden or discriminate against interstate commerce, that fact is immaterial. *Heisler v. Thomas Colliery Company,* 260 U.S. 245 (1922), presents a strikingly similar situation. There the plaintiffs claimed that the Governor of Pennsylvania advocated enactment of a tax on coal production because it would exact "tribute" from interstate commerce. The Supreme Court said, at 258-259:

> "The contention that the tax is a regulation of interstate commerce seems to be based somewhat upon the declaration of the Governor of the state of its effect upon consumers in other states. We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it *or the motive which impelled it,* . . ."
>
> (Emphasis added.)

To the same effect, *Fletcher v. Peck,* 10 U.S. 87, 6 Cranch 87 (1810); *Sonzinsky v. United States,* 300 U.S. 506 (1937); *United States v. Darby,* 312 U.S. 100 (1941); *United States v. O'Brien,* 391 U.S. 367, 383 (1968); *Palmer v. Thompson,* 403 U.S. 217 (1971).

Austin v. New Hampshire, 420 U.S. 656, 95 S.Ct. 1191 (1975), adds nothing to Appellants' case. In contrast to New Mexico's Electrical Energy Tax which all utilities pay whether ultimately selling their electricity in New Mexico or elsewhere, under New Hampshire's commuter tax ". . . no resident of New Hampshire is taxed on his out-of-state income. Nor is the domestic earned income of New Hampshire residents taxed. In effect, then, the State taxes only the income of nonresidents working in New Hampshire . . ." 95 S.Ct. 1193-94.

7. The Electrical Energy Tax Does Not Violate The Import-Export Clause

The assumptions underlying Appellants' contention are that electricity they generate in this state is in fact exported to Mexico and the Electrical Energy Tax is a tax on something other than a local event, that is, a tax upon a "good in transit". Both are incorrect. First, there is no way of knowing what, if any, portion of electricity generated in New Mexico is transmitted to Mexico. Appellants concede that at the time of generation, which is when the Electrical Energy Tax attaches, "the particular market in which it [energy] will be distributed cannot be identified." (Juris. Statement 5).

Second, even assuming that the same electricity generated here finds its way to Mexico, it has long been established that local activities such as mining, manufacturing and generation of electricity are not part of the export process. *Canton R. R. Company v. Rogan,* 340 U.S. 511, 515 (1951), *Coe v. Errol,* 116 U.S. 517 (1886), *Cornell v. Coyne,* 192 U.S. 418 (1903). See also *Utah Power & Light Company v. Pfost, supra; Oliver Iron Mining Company v. Lord,* 262 U.S. 172 (1923); *Hope Natural Gas v. Hall,* 274 U.S. 284 (1927); *Heisler v. Thomas Colliery Company, supra; Champlin Refining Company v. Corporation Commission,* 286 U.S. 210, 235 (1932). A reading of these cases firmly supports the rule that generation of electricity is not part of either interstate commerce or foreign commerce, but instead precedes it.

CONCLUSION

There is a certain disingenuousness in Appellants' alarm concerning the recent enactment of generation taxes in several states, including West Virginia, (Juris. Statement 29). As the record in this case makes clear, it was Appellants who took

great pains to assure that West Virginia's generation tax would not be invalidated by §2121(a), see Appendix C. In any event, there is little question that New Mexico's Electrical Energy Tax is non-discriminatory within the tests enunciated in the case law and codified in §2121(a).

Wherefore, Appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument and Appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of New Mexico.

Respectfully submitted,

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COUNSEL FOR APPELLEES

Original Signed
By Daniel H. Friedman

By _____
DANIEL H. FRIEDMAN

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, et al.,
Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, et al.,
Appellees.

CERTIFICATE OF SERVICE BY MAIL

Daniel H. Friedman, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is an attorney for Appellees, Arthur B. Snead, Director of the Revenue Division of the Taxation and Revenue Department, Revenue Division of the Taxation and Revenue Department, and State of New Mexico.

2. That the Motion to Dismiss or Affirm submitted herewith has been served upon counsel, in accordance with the provisions of Rule 33 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage

prepaid, properly addressed, this 11th day of August, 1978, to:

Mark Wilmer
Daniel J. McAuliffe
3100 Valley Center
Phoenix, Arizona 85073

Benjamin Phillips
P. O. Box 787
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Santa Fe, New Mexico 87501

Frank Andrews, III
P. O. Box 2307
Santa Fe, New Mexico 87501

3. That the foregoing represents service on all parties required to be served under the provisions of Rule 33, Rules of the United States Supreme Court.

Original Signed
By Daniel H. Friedman

DANIEL H. FRIEDMAN

APPENDIX A

EXCERPT FROM THE BRIEF IN OPPOSITION IN *ARIZONA v. NEW MEXICO*, 425 U.S. 794 (1976).

* * * * *

II. New Mexico's Electrical Energy Tax Neither Discriminates Unconstitutionally Against Interstate Commerce Nor Does It Burden Interstate Commerce.

A. New Mexico's Tax Structure Subjects The In-State Disposition Of Electricity To A Greater Rate Of Taxation Than Electricity Generated For Sale Outside The State; Hence, Under Well-Established Precedents Of This Court The Act Does Not Discriminate Against Interstate Commerce.

* * * * *

1. The Tax Burden On A Particular Taxpayer Or Particular Taxable Incident Is Not Controlling. The Total Tax Structure Must Be Considered In Determining Whether An Unconstitutional Discrimination Exists.

We are not here concerned primarily with the impact of a particular tax on particular taxpayers. Rather, the basic inquiry

must be whether or not New Mexico's total tax structure discriminates against interstate commerce. The correctness of this broad approach has been recognized by this Court in resolving the discrimination question in the early case of *Hinson v. Lott,* 75 U.S. 148 (1869), and the more recent use tax discrimination cases of *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937), and *Southern Pacific Co. v. Gallagher,* 306 U.S. 167 (1939). It was also recognized by the Supreme Court of Washington and this Court in an electrical energy tax case so analogous to this case as to be dispositive of the issue here presented, *Public Utility District No. 2 of Grant County v. State,* 82 Wn.2d 232, 510 P.2d 206 (1973), appeal dismissed for want of a substantial federal question, 414 U.S. 1106 (1973).*

In the *Public Utility District No. 2* case, the Washington Supreme Court had before it a Washington tax on generation of electricity which allegedly discriminated against utilities that sold electricity out of state. Instead of a credit system like New Mexico's, Washington taxed the sale of power at every level of distribution, but allowed a *deduction* for receipts from resale of the power in-state. If the power was resold out-of-state, the deduction was not available. The utilities argued that the unlawful discrimination occurred because the wholesaler or generator who sold for resale in the state received the deduction, while the wholesaler or generator who sold to an Oregon utility for resale in Oregon did not. To this argument the Washington court responded:

> ". . . a proper analysis must take the whole scheme of taxation into account to determine whether the actual operation of that taxing structure in its relationship to intrastate and interstate commerce results in an unconstitutional discrimination against the latter. [Here the

---

* The appeal to this Court was based on the contention that the Washington electrical energy tax discriminated against interstate commerce in violation of Article I, Sec. 8 of the United States Constitution. The dismissal by this Court means that the case was decided *on the merits* and that lower courts presented with the same issue are bound by the decision. *Hicks v. Miranda,* ____ U.S. ____, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

Court footnotes 12 U.S. Supreme Court and state court decisions.]

* * *

"*Considered in isolation,* as urged by respondents, the Washington tax deduction provision may also be discriminatory; it was intended to apply solely to sales for resale within this state. Alone, it may be invalid, but *it does not stand alone,* and this fact, and the failure of the respondents and the trial court below to so recognize, results in their abbreviated analysis. This isolated evaluation led the trial court in Silas Mason Co. v. Henneford, 15 F.Supp. 958 (E.D.Wash. 1936), rev'd, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937), to declare invalid the tax in question. Similarly, here, it could lead us to strike down the tax assessment without having correctly evaluated the taxing scheme's operation.

"This scheme contains no constitutional infirmity, for 'There is no demand in [the] Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's Constitutional power.' Gregg Dyeing Co. v. Query, 286 U.S. 472, 480, 52 S.Ct. 631, 634, 76 L.Ed. 1232 (1932). A similar deduction provision, RCW 82.03.430(6), was at issue in Crown Zellerbach in which a unanimous court found that to disallow the deduction ignores the lawful purpose behind its operation. Imposition of actual tax liability is the purpose advanced by such statutes in an effort to avoid double or triple tax liability as to particular products or activities. 'In other words, the policy is to impose *actual liability* for payment of tax only once. . .' Crown Zellerbach Corp. v. State, supra, 45 Wash. 2d at 753, 278 P.2d at 308." 510 P.2d at 210 [Emphasis added.]

In *Hinson v. Lott, supra,* the combined effect of a distiller's (manufacturing) tax and a merchant's tax on the sale of imported liquor was considered. The merchant's tax was attacked on the ground that it discriminated against interstate commerce, by reason of the fact that it applied only to the sale of liquor

imported into the state. This Court sustained the tax, holding that no discrimination existed, in view of the fact that locally produced liquor, while not subject to the merchant's tax, was subject to the distiller's tax. These taxes were equivalent in amount but imposed on different taxpayers.

In the *Gallagher* and *Henneford* cases, this Court sustained use taxes imposed on products purchased without the state, holding that no discrimination existed in view of the fact that sales taxes were imposed on products sold within the state. This approach has been used to strike down, as well as sustain, state taxes. Thus, in *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963), a use tax was found invalid as applied to an out-of-state fabricator using the fabricated goods in Louisiana, but this Court reaffirmed the broad approach of analyzing the entire tax structure. 373 U.S. 69-70.

These cases illustrate the proposition that it is the practical effect of the *total state tax burden* as applied to the commodity of commerce, here electrical energy, which ultimately controls.

2. The New Mexico Tax Structure With Respect To Electrical Energy Does Not Discriminate Against Interstate Commerce.

As clearly established by the cases discussed in the preceding subsection, the total tax burden imposed on different taxpayers or imposed on different aspects of one subject of taxation, here electricity, must be considered together in analyzing a claim of discrimination against interstate commerce. If the commodity of commerce (in *Hinson,* liquor, in *Southern Pacific Co. v. Gallagher* and *Henneford,* tangible personal property and in *Public Utility District No. 2* and in this case electrical energy) is subject to equivalent taxation by the state, whether ultimate use and consumption be within or outside this state, there is no discrimination.

The only basis for any discrimination argument is the credit against gross receipts tax allowed by Sec. 72-16A-16.1(B),

N.M.S.A. 1953 (1975 Interim Supp.), the text of which was set forth previously in this brief. The obvious purpose of this provision is to collect a tax only once from in-state sellers, not to impose the generation tax in addition to the 4% gross receipts tax. The in-state sale of electricity generated in New Mexico is not exempted; it is taxed, just as the out-of-state electricity is, and at the significantly *higher* rate of 4%. The legislative purpose is no different from that found by the Washington Supreme Court in the case of *Public Utility District No. 2 v. State, supra,* where it sustained a privilege tax on electricity so close to the tax at issue here as to the foreclose plaintiff's commerce clause contentions in this case.

The tax in *Public Utility District No. 2 v. State* was a privilege tax on the light and power business measured by gross income. The tax was imposed at every level of distribution. The deduction which allegedly violated the commerce clause read as follows, 510 P.2d at 207, fn. 2:

> "Deductions in computing tax. 'In computing tax there may be deducted from the gross income the following items:
> " '. . . (2) Amounts derived from the sale of commodities to persons in the same public service business as the seller, *for resale* as such *within this state. . .*' " [Emphasis added.]

The public utility districts sold power at wholesale to Washington utilities for resale in Washington. The income from these sales was deductible. They also sold at wholesale to Oregon utilities for resale in Oregon. The income from these sales was not deductible, producing the alleged discrimination. The Washington Supreme Court conceded that, viewed in isolation, the deduction provision could be discriminatory, but it went on to rule that the provision must also be considered in the light of the whole statutory framework for taxation of the subject matter:

> "*The* public utility *tax on electrical power* originating in this state *is to be imposed only once* under the Washington taxing scheme. The deduction here at issue permits this singular tax imposition by preventing the pyramiding

effect of the public utility tax, which is otherwise certain to occur. The only relevant difference between the present case and Crown Zellerbach is that, rather than having an interrelated tax structure (manufacturing-wholesaling) imposed, this case has a shifting tax structure in which singular tax liability exists but shifts to another utility. By so doing, the in-state distribution of the use of power is *not* exempted and is taxed, just as is the out-of-state distribution of power. Equal treatment is the theme of this system. H & D Communications Corp. v. Richland, 79 Wash.2d 312, 484 P.2d 1141 (1971). The out-of-state utility is in no worse position than its instate competitor. The state is playing no favorite with its resident businesses at the expense of similarly situated out-of-state enterprises.

• • •

"The confusion results, in part, because the respondents look only to their status as complaining public utilities at the time of their sales to in-state or out-of-state purchasers, and not to the impact of the total tax structure on the subject matter here involved, the disposition and use of power. *If the whole tax scheme is evaluated, the tax deduction that is made at the sale to a Washington utility is made up at the time the Washington utility buyer sells to its customers.* Thus, 'In the instant case, there is no burden on interstate commerce that is not placed on intrastate commerce.' H & B Communications Corp. v. Richland, supra, 79 Wash.2d at 314, 484 P.2d at 1144. The in-state and out-of-state disposition of power is equally treated. There is tax equivalence here and no discrimination on interstate commerce.

"Judgment reversed." 510 P.2d at 211. [Emphasis added.]

Similarly, New Mexico's intention with respect to electrical energy generated and sold by utilities in New Mexico is that the transactions be taxed only once. Consequently, the legislature has provided that the electrical energy tax may be credited against the gross receipts tax due on subsequent sales in New Mexico. Obviously, the same result could have been accomplished by imposing the type of tax and deduction sustained

in the Washington *Public Utility District No. 2* case. The tax effect is the same in both structures; the difference lies only in the form of the two systems, not in their substance.

There are a number of other precedents which strongly support the constitutionality of New Mexico's choice to allow the electrical energy tax credit against gross receipts tax. These cases consider not the impact of a particular tax on particular taxpayers, but whether the total tax structure with respect to electrical energy discriminates against interstate commerce.

A South Carolina statute containing the credit feature of New Mexico's tax scheme was considered in *South Carolina Power Co. v. South Carolina Tax Commission*, 52 F.2d 515 (E.D.S.C. 1931), aff'd 286 U.S. 525 (1932). South Carolina imposed a tax of 5/10 of one mill upon each kilowatt hour of electric power *generated* in South Carolina and also an excise tax of 5/10 of one mill upon each kilowatt hour of electricity *sold* in the state. This statute provided that if the seller subject to the sales tax procured electric power which was subject to the payment of the privilege tax, a *credit* on the sales tax in the amount of the privilege tax already paid by the person generating the electricity would be allowed. Utilities attacked the South Carolina taxes as unconstitutionally burdening and discriminating against interstate commerce. In commenting upon this statutory scheme the court noted:

> "The evident purpose of the act is to impose a tax upon the current used within the State and to impose it at the source or as soon as the current becomes subject to the jurisdiction of the taxing power, but not to impose but once. . . . If current produced as well as sold within the state were subjected to the sales tax such current would rest under a double burden of taxation. To avoid this and at the same time to preserve the system of taxing at the source, current which is produced within the state is taxed at the time of generation but is relieved of the sales tax, which is equal in amount, with the result that all currents sold within the state, whether produced there or brought in from another state, pays exactly the same tax." 52 F.2d at 521

In resolving the question of validity of the tax on the generation of electrical current, the court upheld the tax on the basis of taxable events *preceding* interstate commerce on authority of *Oliver Iron Mining Co. v. Lord,* 262 U.S. 172 (1923), *Hope Natural Gas Co. v. Hall,* 274 U.S. 284 (1927) and *American Manufacturing Co. v. St. Louis,* 250 U.S. 459 (1919). In reference to current brought into the state which was subject to the sales tax the court said:

> "The point that the tax on sales is a discrimination against current which has passed in interstate commerce, because current which has paid the local generation tax is exempted from the sales tax, has already been considered in discussing the points raised under the Fourteenth Amendment. The cases of Hinson v. Lott, supra, 8 Wall.148, 19 L.Ed. 387 and Doscher v. Query, supra (D.C.) 21 F. (2d) 521, 525, sufficiently answer this proposition." 52 F.2d at 526.

Citing the *South Carolina Power* and *Hinson* cases, *Oldetyme Distillers, Inc. v. Gordy,* 17 F.Supp. 424 (D.Md. 1936) also held that a whiskey manufacturing tax credit against a subsequent sales tax did not discriminate against interstate commerce.

The totality of a state's pattern of taxation was recognized by this Court in the license tax case of *Alaska v. Arctic Maid,* 366 U.S. 199 (1961). Alaska imposed a "license" tax upon only the business of operating freezer ships and other floating cold storages, measured by the value of fish obtained for processing through freezing. In fact, the tax fell only upon out-of-state businesses because they were the only ones who operated freezer ships. The ship operators purchased fish caught in Alaskan territorial waters, froze the fish and then transported the fish to the State of Washington for canning. They alleged that the Alaskan taxing scheme discriminated against their interstate businesses because (1) there was no tax on fish caught and frozen in Alaska and destined for canning in Alaska, and (2) fish processors selling fresh frozen fish in the Alaskan consumer market were taxed at a lower rate.

This Court first found that the license tax was imposed upon an occupation made up of local activities within the reach

of Alaska's taxing authority, citing *Oliver Iron Mining v. Lord, supra,* and *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954). It then held that the tax in question did not discriminate against interstate commerce because in-state businesses which had to pay other local taxes rather than the license tax, were not preferred against out-of-state competitors. The Court reasoned that there could be no discriminatory preference in favor of local canners because they paid a greater tax upon fish obtained for canning. The Court stated:

> "When we look at the tax laid on local canners and those laid on 'freezer ships', there is no discrimination in favor of the former and against the latter. For no matter how the tax on 'freezer ships' is computed, it did not exceed the six per cent tax on the local canners. Hence cases such as Pennsylvania v. West Virginia [citation omitted] which hold invalid state laws that prefer local sales or interstate sales, are inapposite." 366 U.S. at 204-205.

In this case, the generation tax on electrical energy, no matter how it is computed, does not exceed the 4% burden on in-state disposition of power.

In *Gregg Dyeing Co. v. Query,* 286 U.S. 472 (1931), this Court upheld a complementary taxing statute imposed on gasoline brought into the state for storage, use and consumption against the contention that the statute discriminated against interstate commerce. In disposing of this argument, the Court construed a separate statute *in pari materia* and concluded it imposed an equivalent tax on use and consumption of gasoline in the state.

Henneford v. Silas Mason Co., supra, Southern Pacific Co. v. Gallagher, supra, and *Hinson v. Lott, supra,* also support the proposition that New Mexico's generation tax and gross receipts tax credit work no discrimination against plaintiffs because the New Mexico burden on in-state disposition of electricity is greater than the generating tax on electricity taken out of New Mexico.

New Mexico's tax structure with respect to electricity is not distinguishable constitutionally from the electrical energy tax cases of *Public Utility District No. 2* and *South Carolina Power Co.*; the liquor cases of *Hinson v. Lott* and *Oldetyme Distillers;* the sales and use tax cases of *Gallagher* and *Henneford v. Silas Mason Co.*; and the license tax case of *Arctic Maid.* These cases establish that the tax burden imposed on different taxpayers or imposed on different incidents of taxation must be considered together in resolving the discrimination issue. And they held that there is no discrimination against interstate commerce if the commodity of commerce, here electrical energy, is subject to equivalent taxation by the state, whether or not the ultimate use and consumption is within or without the state.

The issue of discrimination against interstate commerce is a practical one, not an abstract or academic question. As stated by this Court in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 fn. 2 (1940):

> "Despite mechanical or artificial distinctions sometimes taken between the taxes deemed permissible and those condemned, the decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage." [Reference to numerous cases follows in the footnote.]

In the *Arctic Maid* case, the Court reasoned that there could be no such discriminatory competitive preference, since Alaskan processors freezing fish for the local retail market were not in competition with processors freezing fish for canning out of state. This was precisely the same reasoning approved by this Court in the *Public Utility District No. 2* case where it was held that there was no discriminatory preference for in-state business because:

> ". . . the public utility districts selling out-of-state are not in competition with one who sells in-state." 510 P.2d at 210.

Similarly, the Arizona utilities taxed under the Electrical Energy Tax Act are not in competition with New Mexico electrical utilities, and plaintiff does not allege that they are.

New Mexico seeks to tax the generation of electrical energy in this state. All generators of electrical energy in this state must pay the tax. That the electrical energy tax may be credited against gross receipts tax is only to prevent in-state power from being subjected to more than a 4% tax. It does not have the effect, under New Mexico's tax structure, of exempting the in-state generation and sale of power. This state's tax structure on electrical energy is designed to subject to one tax, but only one tax, the commodity of electrical energy. The taxation of this subject does not discriminate against interstate commerce.

In its complaint (second cause of action, Par. IV) and brief (pp. 21, 23, 26) Arizona makes much over its allegation that the New Mexico legislature intended to discriminate against Arizonans and interstate commerce. This allegation is reminiscent of the one made in *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922). There, plaintiffs claimed that the Governor of Pennsylvania advocated enactment of a tax on coal production because it would exact "tribute" from interstate commerce. This Court said, 260 U.S. 258-59:

> "The contention that the tax is a regulation of interstate commerce seems to be based somewhat upon the declaration of the Governor of the State of its effect upon consumers in other States. We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a State impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it. . . ."

APPENDIX B

TEXT OF §2121 (FORMERLY §1323) OF THE TAX REFORM ACT OF 1976 AS APPROVED BY THE SENATE FINANCE COMMITTEE AND PASSED BY THE SENATE, PRIOR TO AMENDMENT IN THE HOUSE-SENATE CONFERENCE COMMITTEE (R. 1, 031)

SEC. 1323. PROHIBITION OF DISCRIMINATORY STATE TAXES ON PRODUCTION AND CONSUMPTION OF ELECTRICITY.

(a) IN GENERAL.–The Act entitled "An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto", approved September 14, 1959 (73 Stat. 555; 15 U.S.C. 381 et seq.) is amended by striking out title II (relating to studies) and inserting in lieu thereof the following:

"TITLE II–DISCRIMINATORY TAXES

"Sec. 201. (a) No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation of electricity for transmission in interstate commerce which is discriminatory against out of State manufacturers, producers, wholesalers, retailers or consumers of that electricity. For purposes of this section a tax is discriminatory that either directly or indirectly results in the payment of a higher gross or net tax on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

"(b) EFFECTIVE DATE.–The amendment made by subsection (a) applies with respect to taxable years beginning after June 30, 1974."

APPENDIX C

LETTER FROM COUNSEL FOR ARIZONA PUBLIC SERVICE CO. TO SENATOR PAUL J. FANNIN (R.701-702)

Law Offices, SNELL & WILMER
(Letterhead omitted)

3100 Valley Center
Phoenix, Arizona 85073

June 10, 1976

The Honorable Paul J. Fannin
United States Senator
3121 Dirkson Senate Building
Washington, D.C. 20510

Dear Senator Fannin:

On the way back from Washington and while here, I have reviewed in much greater detail the proposed Amendment to Section 1322. I am enclosing what we consider to be far better language.

The first sentence should read as follows:

SEC. 201

(a) No state, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out of state manufacturers, producers, wholesalers, retailers or consumers of that electricity.

Upon reflection, this change is critical. Without it, the State of New Mexico will simply make the argument that Section 201(a) does nothing but prohibit taxes on interstate commerce, the very argument they are making in Court today on the challenge to the generation tax. The old language is susceptible to the interpretation that the New Mexico generation tax is imposed upon the local event of generation and not upon the "generation of electricity for transmission in interstate commerce". If there is any way in which the language can be changed to the above, it should be done.

We have also changed the second sentence to read as follows:

> For purposes of this section a tax is discriminatory that results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

While this change is not as critical as the change in the first sentence, we do think that you might have difficulty with Senator Byrd with the old language. After reading carefully the West Virginia Statute and the case of *Virginia Electric and Power Company v. Haden,* 200 S.E. 2d 848 (W. Va., 1973), it is our opinion that with the phrase "gross or net" included, Virginia consumers, or out-of-state producers of electricity operating in West Virginia, could well argue that this bill prohibits West Virginia's tax. With the language as we have changed it, we do not feel that that argument will be available to them.

It is my understanding that the language has already come out of the Committee, and, therefore, the above changes may be difficult to make. However, Senator Byrd might well be of assistance in that respect in light of the above.

Finally, it is imperative that a clear legislative history be made. Without it, we could probably dream up another dozen arguments that it does not apply to the generation tax in New Mexico. None of them would withstand a good legislative history, however. We think the legislative history should include that the language in the second sentence is intended to include the New Mexico generation tax specifically.

Thank you for your continued cooperation in this matter and our continued best wishes.

Very truly yours,

s/ Bruce Norton

Bruce Norton

BN:cd
Enclosure

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,

Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO,

Appellees.

On Appeal From The Supreme Court of New Mexico

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO,

Appellees.

On Appeal From The Supreme Court of New Mexico

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The stated grounds of the appellees' Motion to Dismiss or Affirm (hereinafter "Motion") is that the various Federal questions presented by New Mexico's Electrical Energy Tax Act (hereinafter "the Energy Tax" or "the Act") are so insubstantial as not to warrant further consideration. The Motion supports this conclusion, however, only by rewriting §2121(a) of the Tax Reform Act of 1976, 15 U.S.C. §391, by misstating its legislative history, by ignoring the Energy Tax' dis-

criminatory treatment of wholesale sales of electricity, and by requesting this Court's summary approval of a hypothetical tax which New Mexico might have, but concededly did not, enact. The Federal questions presented by the actual Energy Tax are clearly substantial, and have been resolved by the Supreme Court of New Mexico in a fashion inconsistent with this Court's prior teachings:

1. Appellees concede the novelty of the question whether imposition of the Energy Tax is forbidden by §2121(a) of the Tax Reform Act, 15 U.S.C. §391 (hereinafter "§391"), but contend that it is easily resolved in their favor. The substance of this argument is that New Mexico's tax structure, viewed as a whole, does not discriminate against electricity generated in New Mexico and transmitted to and consumed in other states. This ignores the patent discrimination of New Mexico's tax structure against producers of electrical energy which is wholesaled for eventual consumption outside New Mexico.

As was noted in the Jurisdictional Statement, New Mexico's Gross Receipts Tax Act, §§72-16A-1, *et seq.*, NMSA 1953, applies with virtual uniformity to most *retail* sales of electricity in New Mexico, but does not apply at all to *wholesale* transactions. At the wholesale level, there is *no* New Mexico tax imposed on locally-consumed energy, because the "assigned credit" of §9(C) of the Energy Tax will wholly abate any liability

for that levy, and the Gross Receipts Tax is by its very terms inapplicable.[1]

More importantly, the argument requires the addition to §391 of critical language which Congress never enacted, in order to derive a test of discrimination which Congress never intended. Section 391 must be interpreted according to the plain meaning of its text.[2] That text speaks of "*a tax* on or with respect to the generation or transmission of electricity," not *all taxes* or the *total tax structure*. The language "or indirectly" in §391 does not suggest any different test of discrimination; it merely indicates that Congress meant to forbid discriminatory burdens imposed through indirection, such as by the credit provisions of the Energy Tax. In short, Congress legislated to forbid the imposition of any single State tax on or with re-

---

[1] Appellees assert that the Energy Tax is even-handed, because it is *paid* by every generator of electricity. (Motion, pp. 4, 8). That is simply not the case. Under the Regulations issued originally by the Commissioner of Revenue (Jurisdictional Statement, Appendix E), generators of electricity to be consumed in New Mexico receive an immediate "potential" credit which will eventually expunge all Energy Tax liability.

[2] At the very most, appellees' statutory argument indicates a minor degree of ambiguity in the language of §391. In the face of such ambiguity, it becomes the task of this Court to construe the statute in a fashion which best effectuates the intent of Congress:

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. *United States v. American Trucking Assoc.*, 310 U.S. 534, *reh'g. denied*, 311 U.S. 724 (1940).

Accord, United States v. Alpers, 338 U.S. 680, 681-82 (1950); *United States v. Rosenblum Truck Lines*, 315 U.S. 50, 53 (1942); *Haggar Co. v. Helvering*, 307 U.S. 389, 394 (1940).

spect to the generation or transmission of electricity which is in fact discriminatory against interstate transactions. The Energy Tax is clearly subject to that prohibition.[3]

Appellees' treatment of §391's legislative history similarly misses the mark. Initially, appellees contend that the legislative history discussed in the Jurisdictional Statement concerns a separate bill which was only made part of the Tax Reform Act when the latter reached the House-Senate Conference Committee. That is simply erroneous. The legislative history cited in the Jurisdictional Statement is solely that of the Tax Reform Act, and the provision that was to become §391 was part of that bill well prior to the Report of

[3] Appellees also interject the argument that §391 reaches only discriminatory taxes on "electricity generated . . . in interstate commerce" and is thus inapplicable, because all electricity is generated in intrastate commerce. (Motion, p. 13). That is simply not what the statute says. The statutory definition of a discriminatory tax refers to "electricity which is generated *and transmitted* in interstate commerce." 15 U.S.C. §391 (emphasis added). The transmission of electricity for consumption outside New Mexico clearly occurs in interstate commerce. *Fed'l. Power Comm'n. v. Florida Power & Light Co.*, 404 U.S. 453, *reh'g. denied*, 405 U.S. 948 (1972). The point is that appellees can sustain the Energy Tax only by adding or deleting unenacted language to §391.

the Senate Finance Committee. S. Rep. No. 94-938-Part I, 94th Cong., 2d Sess. (1976).[4]

Appellees effectively concede that the provision in question, as reported by the Finance Committee and passed by the Senate, was intended to and did invalidate the Energy Tax. Appellees rely instead upon a presumed transformation of Congressional intent, supposedly evidenced by a minor language substitution made by the Conference Committee. That Committee, as noted in the Jurisdictional Statement, did change the words "higher gross or net tax" in the Senate version, to "greater tax burden", the formulation eventually enacted. There is certainly nothing in the language selected by the Conference Committee which signifies a departure from the meaning or intent of the Senate-passed bill. There are no legislative materials to support appellees' claim of a radical alteration of legislative purpose. Quite to the contrary, the Report of the Conference Committee unequivocally states that its version "follows the Senate

[4] Appellees also attempt to rely upon a letter from counsel for one of the appellants to support certain gratuitous assertions concerning the derivation of §391. If nothing else, the correspondence in question confirms that §391 has always been intended to reach the Energy Tax. Appellees overlook the fact, however, that the letter was generated long before passage of the bill *by the Senate* and can have no bearing whatsoever on proceedings in the Conference Committee. More significantly, simple logic indicates that the process of statutory construction, which has as its purpose the identification of the legislative body's intent, should only take into account materials considered by the legislative body as a whole. Materials so far removed from the mainstream of the legislative process are irrelevant to a determination of Congressional intent.

amendment" and presumably its intent as well. H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. (1976) 503, as reported in 1976 U.S. Code Cong. & Admin. News 4206; S. Conf. Rep. No. 94-1236, 94th Cong., 2d Sess. (1976) 503.

Appellees also attempt to argue that §391 was not meant to apply to what is in effect a reduction of New Mexico's sales tax. (Motion, pp. 13, 15). That is not, however, the legislation New Mexico enacted. This Court cannot rule on hypothetical taxes:

> We can only consider the legislation that has been had, and determine whether or not its necessary operation results in an unjust discrimination between the parties charged with its burdens. *Travelers Ins. Co. v. Connecticut*, 185 U.S. 364, 371 (1902).

Cf. also, McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330 (1944); *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 563 (1935). The Energy Tax, as enacted, imposes a greater tax burden on electricity sold at wholesale and transmitted in interstate commerce and violates the plain language of §391.

Finally, the contention is made that §391, if found applicable to the Energy Tax, is itself unconsitutional. Legislation such as §391 has repeatedly been found within Congress' delegated powers. *Cf. Heublein v. So. Carolina Tax Comm'n.*, 409 U.S. 275 (1972); *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954); *Hill v. Florida*, 325 U.S. 538 (1945). Appellees' arguments are simply insufficient to satisfy the burden of rebutting the strong presumption of validity that attaches to an Act of Congress. *Cf. e.g., United States v. Nat'l. Dairy Products Corp.*, 372 U.S. 29 (1963); *Helvering v. Davis*,

301 U.S. 619 (1937); *United States v. Butler*, 299 U.S. 1 (1936). By putting in issue the constitutionality of a Federal statute, appellees have merely confirmed the significance of the Federal questions presented and the need for plenary consideration.

2. Appellees initially attempt to mask the discrimination of the Energy Tax against interstate transactions at the wholesale level by arguing that the generation of electricity is a separate local activity, relying principally upon *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932). The *Pfost* decision, as well as other decisions of this Court concerning severance or production taxes (see Jurisdictional Statement, p. 20), holds only that a production tax uniformly applied does not offend the Commerce Clause. That proposition is irrelevant here, where the tax is imposed *only* if the goods produced (electricity) are marketed and consumed outside New Mexico.

Recognizing this difficulty, appellees argue that the Energy Tax is in fact on the commodity of electricity and that inquiry must be made of New Mexico's total tax structure with respect to electricity to ascertain whether the Energy Tax is discriminatory. That inquiry is of no assistance to appellees' position. Analysis of New Mexico's total tax structure reveals that a wholesale sale of electricity for local consumption is subject to no tax whatsoever, while a wholesaler of electricity for consumption in other states must pay the Energy Tax. That is clearly discriminatory and violates the rule of equal treatment announced in *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963).

Appellees cannot, and do not, dispute that the Energy Tax discriminates against interstate transactions at the wholesale level. In response, they can only state that: "It is hard to see why special significance is attached to wholesale transactions." (Motion, p. 9). The record, however, shows that the wholesaling of electricity is a separate and significant sphere of economic activity for appellants and their New Mexico utility competitors. New Mexico simply cannot be heard to contend that the wholesaling of electricity is of no importance. After all, the elaborate credit assignment-reimbursement mechanism created by §9 (C) of the Act was designed to insure that locally-consumed electricity did not incur any Energy Tax liability at the wholesale level. Even were the argument available to New Mexico, there is no *de minimis* defense to violations of the Commerce Clause.

The result in *Public Utility Dist. No. 2 v. State*, 82 Wash. 2d 232, 510 P.2d 206 (1973), *appeal dismissed*, 414 U.S. 1106 (1974) is not to the contrary. There, several Washington utilities contended that Washington's gross income tax could not properly be applied to income from the sale of power to certain Oregon utilities. The tax in question permitted deductions from sales in interstate commerce and for wholesale sales for resale in Washington. The latter deduction was to avoid "pyramiding" with the state's retail tax on electricity and was held not arbitrary. A similar deduction was available for interstate sales, so there was no issue of discrimination against interstate commerce.

As for the sales which had been taxed in that case, it was established that both the sale and the delivery of the power in question had taken place in Washington. Interstate commerce was not involved. *Public Utility Dist. No. 2* simply holds that a state may properly tax the sale of power which is generated, sold and delivered within its borders. That has no bearing on the present case. The Energy Tax concededly discriminates against interstate transactions in electricity at the wholesale level. No case cited by appellees sustains such clear discrimination, or holds that the constitutional question thereby presented is insubstantial.

3. Appellees are understandably ambivalent in their characterizations of the Energy Tax. The Act's concededly discriminatory impact is defended by arguing that the tax is on the commodity of electricity, and that the State's entire taxing structure for that commodity is non-discriminatory. When this is shown to result in multiple taxation of a good transmitted in interstate commerce, the Energy Tax is defended as one on the activity of generation, which is localized and can only be taxed by New Mexico. The inconsistency of the State's position is apparent.

In its practical operation, the Energy Tax is not a production tax on the generation of electricity. Moreover, its burden falls solely upon electricity transmitted in interstate commerce, which the record amply demonstrates is subject to additional taxation in the states where it is eventually consumed. Such multiple taxation of interstate commerce clearly presents a significant Federal question. *Gen'l. Motors Corp. v. Washington*, 377 U.S. 436 (1964).

4. Appellees do not dispute that the stated purpose and necessary effect of the Energy Tax was to collect tax revenues solely from persons residing outside the State of New Mexico. They argue only that the Energy Tax should not be invalidated on the basis of the motivations of the enacting body. The argument misses the point.

The impact of the Energy Tax does in fact fall entirely outside the borders of New Mexico. Its legislative history merely serves to confirm that this comports with the intention of the New Mexico legislature. Obviously, the intention of the enacting body is pertinent to whether the Energy Tax discriminates against producers which wholesale energy for consumption outside the State. In *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318 (1977), this Court considered statements issued by the President of the New York Stock Exchange and the Governor of New York in confirming its conclusions as to the discriminatory nature of the New York tax involved. 429 U.S. at 323, 327, fn. 7, 10.

By quibbling over the pertinence of the legislative history of the Energy Tax, appellees tacitly recognize that its impact has been accurately described. Its burden falls entirely on residents of other states, and such an exaction exceeds New Mexico's taxing powers.

CONCLUSION

The parties understandabiy differ as to the appropriate resolution of the issues presented by the Energy Tax. It does not follow, however, that these Federal questions are so insubstantial that summary dismissal is justified, and appellees have not justified such a

disposition. The Motion to Dismiss or Affirm should be denied, and the issues set forth in the Jurisdictional Statement should be granted plenary consideration.

Respectfully submitted,

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By Daniel J. McAuliffe
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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, et al.,

Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, et al.,

Appellees.

CERTIFICATE OF SERVICE BY MAIL

DANIEL J. McAULIFFE, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is an attorney for Appellants herein, Arizona Public Service Company, El Paso Electric Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, and Tuscon Gas & Electric Company.

2. That the Brief In Opposition To Motion To Dismiss Or Affirm submitted herewith has been served upon counsel, in accordance with the provisions of Rule 33 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed, this 18th day of September, 1978, to:

Toney Anaya
Attorney General of New Mexico
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Santa Fe, New Mexico 87503

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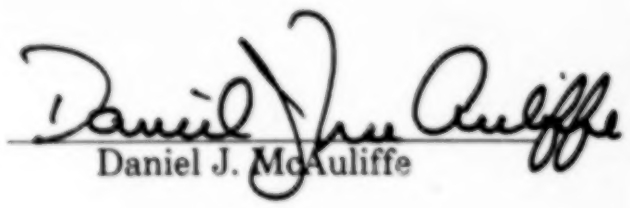
3. That the foregoing represents service on all parties required to be served under the provisions of Rule 33, Rules of the United States Supreme Court.



Daniel J. McAuliffe

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY, *Appellants*,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO, *Appellees*.

On Appeal From The Supreme Court of New Mexico

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v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO, *Appellees.*[1]

On Appeal From The Supreme Court of New Mexico

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The Opinion of the Supreme Court of New Mexico is reported at 91 N.M. 485, 576 P.2d 291, and was

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[1] Appellees in the New Mexico Supreme Court, in addition to the State of New Mexico, were the Bureau of Revenue and its Commissioner, Mr. Fred O'Chesky. By New Mexico Laws 1977, Chapter 249 (effective March 31, 1978), the Bureau of Revenue was abolished and the Electrical Energy Tax Act was amended to define

printed as Appendix B to the Jurisdictional Statement. The Memorandum Opinion of the District Court of the First Judicial District, Santa Fe County, New Mexico, is not reported and was printed as Appendix A to the Jurisdictional Statement. No other written opinions have been delivered.

JURISDICTION

The opinion of the Supreme Court of New Mexico was issued and filed on March 23, 1978 (App. 3, 147). No petition for rehearing was submitted. A Notice of Appeal was filed in the Supreme Court of New Mexico on April 12, 1978 (App. 3, 148), and the Jurisdictional Statement was filed in this Court on June 21, 1978. The appeal was docketed on that date, and this Court noted probable jurisdiction on October 10, 1978. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the United States Constitution involved are set forth in Appendix I. The text of the New Mexico Electrical Energy Tax Act is set forth in Appendix II. The full text of Section 2121(a) of the Tax Reform Act of 1976, 90 Stat. 1914, 15 U.S.C. § 391, is as follows:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section, a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

"Bureau" as the Revenue Division of the Taxation and Revenue Department. The Revenue Division and its Director, Mr. Arthur B. Snead, have succeeded to the functions of the Bureau of Revenue and Mr. O'Chesky, respectively, and have been substituted as parties here, pursuant to Rule 48(3), Rules of the Supreme Court.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Is the New Mexico Electrical Energy Tax Act, which effectively applies only to electricity generated in New Mexico and transmitted to other states for sale and consumption, discriminatory within the meaning of § 2121(a) of the Tax Reform Act of 1976?

2. May a state, consistently with the limitations imposed by the Commerce Clause, impose a tax which burdens only electricity generated within that state and transmitted to other states for sale and consumption?

3. Does a state tax, the clear purpose and effect of which is to collect revenue solely from citizens of other states, violate the Commerce Clause and the Due Process Clause of the Fourteenth Amendment?

4. Is it a violation of the Import-Export Clause for a state to impose a tax whose economic incidence is on electricity transmitted for sale and consumption in a foreign nation?

STATEMENT OF THE CASE

This is an action commenced by appellants in the District Court of the First Judicial District, Santa Fe County, New Mexico, seeking a judgment declaring the provisions of New Mexico's Electrical Energy Tax Act, Chapter 263, Laws 1975 (Appendix II) to be unconstitutional and void by reason of the provisions of Article I, Section 8, cl. 3, Article 1, Section 10, Article IV, Section 2, cl. 1, and Amendment XIV of the Constitution of the United States, and by reason of the provisions of Section 2121(a) of the Tax Reform Act of 1976, 90 Stat. 1914, 15 U.S.C. § 391 (App. 4, 9-17, 91-100). The decision of the Supreme Court of New Mexico was in favor of the validity of the Electrical Energy Tax Act (App. 3, 147).

Appellants Arizona Public Service Company (hereinafter "APS"), El Paso Electric Company (hereinafter "EPE"), Salt River Project Agricultural Improvement and Power District (hereinafter "SRP"), Southern California Edison Company (hereinafter "SCE"), and Tucson Gas & Electric Company (hereinafter "TGE") are public utility companies whose service areas encompass the major population centers of El Paso, Texas; Tucson and Phoenix, Arizona; and Southern California (excluding the City of Los Angeles); and their environs (App. 33, 41, 52-53, 58-59, 65-66). EPE also provides retail electric service in an area in south central New Mexico, and is the only appellant regulated as a public utility by the State of New Mexico (App. 41, 43, 91, 111).

Portions of the electricity required to serve these areas, which include an aggregate population in excess of 10 million people, is produced at generation facilities located within the boundaries of the State

of New Mexico (App. 33, 41, 53, 59, 66). Each plaintiff owns an undivided interest in the Four Corners Power Plant located in northwestern New Mexico on the Navajo Indian reservation (App. 33). TGE is an equal co-owner with another utility, Public Service Company, of New Mexico, of units of the San Juan Generating Station, also located in northwestern New Mexico (App. 66). EPE, in addition to its interest in the Four Corners plant, also owns and operates the Rio Grande Generating Station near Anapra, New Mexico (App. 41).

Electrical energy is generated at each of these facilities in response to demands for power in appellants' service areas (App. 35). This electricity is first delivered through a switchyard, to transformers which increase its voltage to a level required for transmission. This high voltage energy is then allocated by switchyard facilities to transmission lines which carry it to the particular service area where it is to be consumed. Until the generated energy is transformed and allocated in this fashion, the particular market in which it will be distributed cannot be identified (App. 34-37, 42-43, 53-55, 60-61, 67-68). The transmission systems of the appellants are inter-connected with each other and with the systems of other electric utilities and the United States Bureau of Reclamation, forming an interstate grid encompassing the entire western United States and portions of Canada and Mexico (App. 34, 42, 53, 59-60, 66-67).

Certain amounts of the power generated at appellants' New Mexico facilities is initially sold, at the wholesale level, to other utilities for subsequent resale. Appellants have engaged in such wholesale transactions both with each other and with other utilities, including Public Service Company of New Mexico (App.

20-23, 38, 44, 48, 50, 55, 61, 68). Each has entered into a "Six Party Economy Energy Agreement," which provides for voluntary sales of energy among the parties thereto under stated circumstances, as well as "Principles of Interconnected Operation" and a "Unit Tripping Agreement," which provides for such sales as an emergency service (App. 37, 43-44, 55, 61, 68). In addition, there are in existence individual contracts between APS and TGE, and between APS and Public Service Company of New Mexico, for wholesale power sales (App. 37). The balance of the energy generated in New Mexico by the appellant utilities is sold at the retail level, for immediate consumption. The vast majority of these retail sales are made after the electricity has been transmitted to the appellants' service areas in other states (App. 23-27).[2]

Each of the utilities has paid and continues to pay taxes imposed by New Mexico (Apportioned Corporate Income, Ad Valorem, Corporate Franchise, Compensating Unemployment, and Excise) in the same manner that wholly intrastate New Mexico utilities pay such taxes (App. 34, 41, 53, 59, 66). In addition, each pays a variety of local and/or state taxes in the state in which the electricity generated at the New Mexico facilities described above is ultimately consumed (App. 39, 45, 56, 63, 69, 78-83).

The New Mexico Electrical Energy Tax Act (hereinafter "the Energy Tax" or "the Act") became effective on July 1, 1975. (The full text of the Act is set forth in Appendix II.) For present purposes, the pertinent provisions of the Act are Sections 3 and 9, which provide:

[2] APS has made some minor retail sales of electricity in New Mexico, and EPE engages in retail sales of power in that portion of its service area which is located in southern New Mexico.

Section 3 (§ 72-34-3, NMSA 1953 (1975 P.S.)):

> A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.004) on each net kilowatt hour of electricity generated in New Mexico.
>
> * * *

Section 9 (§ 72-16A-16.1, NMSA 1953 (1975 P.S.)):

> A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.
>
> B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.
>
> C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit.

Section 3(A) of the Act, § 72-34-3(A), NMSA 1953 (1975 P.S.), purports to impose upon "the privilege of generating electricity in this state for the purpose of sale," a tax of four-tenths of one mill for each net kilowatt hour of electricity generated in New Mexico.

This levy's apparent effect is blunted, however, by the "credit" provisions contained in Section 9, § 72-16A-16.1, NMSA 1953 (1975 P.S.). Section 9(B) permits the generator to take a credit, against the New Mexico Gross Receipts Tax, § 72-16A-1, *et seq.*, NMSA 1953, in the amount of any Electrical Energy Tax paid with respect to electricity *generated and consumed in New Mexico* (App. 112). No similar credit is available for electricity generated in New Mexico but consumed in other states (App. 38, 44-45, 55-56, 61-62, 68-69).

Much of the electricity generated in New Mexico, both by appellants and others, is initially sold in a wholesale transaction for resale at the retail level. The New Mexico Gross Receipts Tax does not apply to such wholesale transactions. Under ordinary circumstances, a generator-wholesaler would not be in a position to invoke the credit provisions of Section 9(B), for that generator would incur no gross receipts tax liability against which to credit the amount of Energy Tax imposed.

Section 9(c) accommodates this situation by requiring the wholesaler to assign the credit arising from assessment of the Energy Tax to the retailer, who may apply it against the Gross Receipts Tax.[3] The section also requires the retailer marketing the electricity *for consumption in New Mexico* to reimburse the wholesaler in an amount equal to the credit against the Gross Receipts Tax which the retailer actually receives (Appendix 112).

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[3] At this stage of distribution, no actual credit arises, as the Gross Receipts Tax is inapplicable to wholesale transactions. Bureau of Revenue regulations (Appendix III) refer to the wholesaler's acquiring a "potential" credit, which is assigned to the retailer. See note 12, *infra*, and accompanying text.

This credit assignment-reimbursement mechanism insures that the generator-wholesaler, who is not subject to the Gross Receipts Tax and would ordinarily receive no benefit from the Section 9(B) credit, will incur no greater tax liability for locally consumer energy (App. 38, 44-45, 55-56, 61-62, 68-69). Throughout the course of this litigation, it has been undisputed that, by operation of the credit provisions of Sections 9(B) and (C), the Energy Tax will impose no additional tax liability upon electricity which is generated and consumed in New Mexico.

Again, Section 9(C) is wholly inapplicable if the wholesaled energy is resold for consumption in another state. Throughout the course of this litigation, it has been undisputed that, by operation of the credit provisions of Sections 9(B) and (C), the Energy Tax will impose no additional tax liability upon electricity which is generated and consumed in New Mexico.

This action was commenced in the District Court of Santa Fe County on September 18, 1975, with the filing of a Complaint seeking a declaratory judgment that the Act was void and unconstitutional by reason of the provisions of Article I, Section 8, cl. 3, Article I, Section 10, Article IV, Section 2, cl. 1 of the Constitution of the United States, and of the due process and equal protection clauses of Amendment XIV to that Constitution (App. 3, 9-17). Subsequent to filing the action, each appellant submitted to the New Mexico Bureau of Revenue a return showing the following amounts of electricity generated by each in New Mexico in July, 1975, and the amount of Energy Tax applicable to that generation which would not be forgiven by the Act's credit provisions (App. 38-39, 45, 56, 62, 69):

Appellant	Amount of Generation (KWH)	Amount of Tax
APS	417,874,000	$167,149.60
EPE	94,720,752 [4]	37,806.70
SRP	48,145,000	19,258.00
SCE	231,003,000	92,401.20
TGE	145,206,000	58,082.40

An initial Motion for Summary Judgment was filed by appellants on September 15, 1976 (App. 6, 30). Following passage of the Tax Reform Act of 1976, appellants filed an Amended Complaint, alleging the Act to be void and unconstitutional by reason of the provisions of Article VI, cl. 2 of the Constitution (App. 6, 91-100). A Supplemental Motion for Summary Judgment was thereafter submitted (App. 6, 102). The State responded with a similar Motion for Summary Judgment and the matter was heard by the District Court in due course (App. 7, 115). Following the issuance of its Memorandum Opinion, the District Court entered Judgment, on February 18, 1977, denying appellants' Motion for Summary Judgment and Supplemental Motion for Summary Judgment, and granting the State's Motion for Summary Judgment (App. 7, 142-44).

An appeal was duly taken to the Supreme Court of New Mexico (App. 7, 145). On March 23, 1978, the New Mexico Supreme Court issued its Opinion, affirming the judgment of the District Court and sustaining the validity of the Energy Tax (App. 3, 147). In its opinion, the New Mexico Supreme Court concluded that the Electrical Energy Tax Act was not a discriminatory tax as defined in the Tax Reform Act. With respect to the constitutional issues, the lower court held that New Mexico's tax structure as a whole did not discriminate against the interstate transmission and sale of electricity and that the Energy Tax was on the generation of electricity, a local event not subject to multiple taxation by other states. The other claimed constitutional infirmities of the Energy Tax were not discussed.

[4] This is a net Energy Tax figure for EPE. EPE's form EE-1 showed that, for July 1975, it had generated 155,314,000 KWH in New Mexico, giving rise to a potential Energy Tax liability of $62,126.00. Because it markets electricity at retail in New Mexico, however, EPE was able to claim a credit, under Section 9(B), of $24,237.30, so that its actual Energy Tax liability was $37,806.70, as shown (App. 45).

SUMMARY OF ARGUMENT

New Mexico's Electrical Energy Tax Act is essentially a "domestic export tax" applicable *only* to goods (here, electricity) produced within New Mexico and transported to other states for sale and consumption. It is unconstitutional and void for any one of several reasons:

1. Exercising its delegated power to regulate matters affecting interstate commerce, the United States Congress enacted § 2121(a) of the Tax Reform Act of 1976, which forbids the imposition by the states of any tax "on or with respect to the generation of electricity" which "results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce" than on locally-consumed energy, 15 U.S.C. § 391. This legislation invalidates, through operation of the Supremacy Clause, any single state tax which falls within this statutory test for discrimination. The Energy Tax clearly satisfies that description. Indeed, the Tax Reform Act's legislative history makes clear that the provision in ques-

tion was prompted in part by the Energy Tax, and intended to invalidate at least that particular tax.

While Section 3 of the Energy Tax purports to reach all electricity generated in New Mexico for the purpose of sale, its actual scope is much more narrowly confined. The credit provisions of the Act, Sections 9(B) and (C), provide that the Energy Tax may be credited against any Gross Receipts Tax liability incurred at the retail level, and require retailers to reimburse generators not subject to the Gross Receipts Tax the amount of any credit received. These credit provisions apply *only* if the electricity is consumed in New Mexico, and effectively insure that the burden of the Energy Tax will *never* be imposed upon electricity generated in New Mexico which is locally consumed.

New Mexico has never disputed that the economic burden of the Energy Tax falls solely upon electricity transmitted in interstate commerce for consumption in other states. That is clearly the "greater tax burden" on such interstate transactions which the Tax Reform Act proscribes. Nevertheless, the lower court found the Tax Reform Act inapplicable, by assuming the presence in the statute of language which Congress never enacted in order to derive a test of discrimination which Congress never intended. Such a contrived process of statutory construction cannot save the Energy Tax.

2. While there has been increased refinement in recent years by this Court of the precise restrictions placed upon the states' taxing powers by the Commerce Clause, there has been no retreat from the cardinal principle that no state may impose a tax, however labeled or formulated, which discriminates against interstate commerce. The Energy Tax is a textbook example of such a discriminatory enactment.

Much of the electricity generated in New Mexico is initially marketed by a generator at the wholesale level to a retailer who will resell it to consumers. If the electricity sold in that wholesale transaction is destined to be consumed in New Mexico, the credit provisions of the Act grant the wholesale seller a mandatory reimbursement from the retailer which expunges any Energy Tax liability. The net effect is that wholesale sales of electricity for consumption in New Mexico suffer no tax burden whatsoever. Wholesale sales of energy which is sold at retail and consumed in other states, on the other hand, are subject to the Energy Tax.

This disparate treatment of wholesale transactions involving interstate commerce clearly violates the rule of "equal treatment for in-state and out-of-state taxpayers similarly situated" enunciated in *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64, 69-70 (1963). The patent discrimination in New Mexico's tax treatment of wholesale sales of electricity cannot be justified by improperly characterizing the Energy Tax as one on the local event of power generation. *Cf. Utah Power & Light Co.* v. *Pfost,* 286 U.S. 165 (1932). No case has ever sustained a state production or severance tax which applied only to goods shipped for consumption outside the taxing state; yet that is precisely what the Energy Tax does.

3. Because of its unique credit provisions, the actual economic incidence of the Energy Tax falls solely and entirely upon electricity generated in New Mexico which is eventually consumed, after transmission in interstate commerce, in other states. This same electricity which bears the exclusive burden of the Energy Tax becomes subject to significant additional taxation when it reaches the state where it is consumed. The

showing in the record of actual multiple taxation of electricity transmitted in interstate commerce for consumption in other states remains uncontroverted.

The resultant overburdening of interstate commerce clearly violates the Commerce Clause and cannot be justified by the fiction that the Energy Tax is merely a production tax on the local activity of power generation. In its practical operation, the incidence of the Energy Tax is determined entirely by events occurring subsequent to generation, and falls, not upon all electricity generated in New Mexico, but only upon that consumed in other states. The Energy Tax is simply not a production or severance tax, but one whose economic incidence is upon the transmission and consumption of electric energy.

4. An analysis of the economic burdens imposed by the Energy Tax reveals that its revenues derive exclusively from the sale of electricity to consumers in states other than New Mexico. Indeed, its legislative history confirms that the Energy Tax was conceived, designed, and principally defended as a measure that would collect revenues solely from consumers in other states, and was carefully tailored to avoid placing any tax burden whatsoever on the residents of New Mexico. The Energy Tax is a conscious attempt to project New Mexico's taxing power beyond its own borders, and exceeds restrictions which the Due Process and Commerce Clauses independently impose.

5. A portion of the electricity generated by appellants in New Mexico is eventually sold and consumed in the Republic of Mexico. The Energy Tax applies to such electricity and does so precisely because of its foreign destination. Where a state tax is imposed upon goods destined for foreign export, the Import-Export

Clause requires that the tax not impinge upon the federal government's ability to govern foreign commercial affairs and not promote interstate friction and rivalry. An enactment such as the Energy Tax which applies to goods precisely because of their foreign destination and subjects those goods to a discriminatory tax burden violates both requirements. To the extent the Energy Tax applies to electricity transmitted to and consumed in the Republic of Mexico, it represents an Impost or Duty forbidden by the Import-Export Clause.

ARGUMENT

I

IMPOSITION OF THE ELECTRICAL ENERGY TAX IS EXPRESSLY PROHIBITED BY THE TAX REFORM ACT.

This Court has consistently recognized that Article I, Section 8, cl. 3 of the Constitution (the "Commerce Clause") vests Congress with virtually plenary regulatory authority in matters affecting interstate commerce, *cf., e.g., Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964); *Katzenbach* v. *McClung,* 379 U.S. 294 (1964), including the power to define the permissible and the impermissible in state taxation of interstate businesses. *Cf.* 15 U.S.C. § 381; *Heublein, Inc.* v. *So. Carolina Tax Comm'n,* 409 U.S. 275 (1972). Once Congress has spoken, the Supremacy Clause (Article VI, cl. 2) requires the invalidation of any conflicting state enactment. *Cf. City of Burbank* v. *Lockheed Air Terminal, Inc.,* 411 U.S. 624 (1973); *Hill* v. *Florida ex rel. Watson,* 325 U.S. 538 (1945).

During the pendency of this litigation, the United States Congress enacted the Tax Reform Act of 1976, which became law on October 4, 1976. Section 2121(a)

of that Act, codified at 15 U.S.C. § 391 (hereinafter "§ 391"), provides:[5]

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

The Tax Reform Act expressly forbids the imposition by a state of any tax "on or with respect to the generation of electricity" which is "discriminatory." A "discriminatory" tax is defined by and for the purposes of that statute as one which "results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce ' than on locally-consumed energy. The Energy Tax falls quite clearly within the scope of that definition.[6]

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[5] Section 2121(b) of the Tax Reform Act, 90 Stat. 1914, provided that the prohibition contained in § 2121(a) was to take effect beginning June 30, 1974 (App. 106).

[6] In its Motion to Dismiss or Affirm (hereinafter "Motion"), the State has suggested that, if § 391 is found applicable to the Energy Tax, then it must be held unconstitutional. (Motion pp. 17-19.) The suggestion is untenable. Legislation such as § 391 has repeatedly been found within Congress' delegated powers. *Cf. Heublein, Inc.* v. *So. Carolina Tax Comm'n, supra; Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). The State has never advanced any argument sufficient to satisfy its burden of rebutting the strong presumption of validity that attaches to an Act of Congress. *Cf., e.g., United States* v. *Nat'l Dairy Products Corp.*, 372 U.S. 29 (1963); *Helvering* v. *Davis*, 301 U.S. 619 (1937); *United States* v. *Butler*, 297 U.S. 1 (1936). The fact that § 391 was intended to apply initially to a specific state statute is of no moment. In *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977), this Court noted, with no apparent constitutional concern, that the issues presented had been partially mooted by amendments to the Securities Exchange Act of 1934 that were "directed to New York's transfer tax in particular . . . ." 429 U.S. at 321, n. 4.

It cannot be disputed that the Energy Tax is one "on or with respect to the generation of electricity. . . ." The discriminatory burden of the Energy Tax is equally apparent. As this Court observed in *Arizona* v. *New Mexico*, 425 U.S. 794 (1976):

> The tax is nondiscriminatory on its face: it taxes all generation regardless of what is done with the electricity after generation. However, the 1975 Act provides a credit against gross receipts tax liability in the amount of the electrical energy tax paid for electricity consumed in New Mexico . . . The State of New Mexico concedes that the Arizona utilities will not be able to take advantage of the credit because their sales of electrical energy are outside the State . . . . 425 U.S. at 794-95.

While Section 3 of the Energy Tax purports to impose a tax on all electricity generated in New Mexico for the purpose of sale, its actual economic impact is not so all-encompassing. Through operation of the credit provisions of Section 9 of the Act, the tax imposed by Section 3 will *never* be paid with respect to energy consumed in New Mexico. Indeed, regulations issued by the New Mexico Commissioner of Revenue expressly recognize that the tax is immediately offset by a potential credit. (The text of G. R. Regulations 16.1:1 is set forth in Appendix III.)

Section 9(B) wholly forgives any electrical energy tax which would be imposed upon electricity consumed in New Mexico, by allowing it to be credited against New Mexico's Gross Receipts Tax (§§ 72-16A-1, *et seq.*). This credit arises *only* when the electricity is sold at retail for consumption in New Mexico. No similar credit is provided for electricity generated in New Mexico but consumed in other markets.

Section 9(C) of the Act insures that the discrimination is complete. A wholesaler of electricity generated in New Mexico incurs no gross receipts tax liability against which the amount of Energy Tax due can be applied. The assigned credit and reimbursement device created by Section 9(C) will directly abate any electrical energy tax imposed on energy sold at wholesale for local consumption, leaving the burden of the tax to fall entirely upon utilities who sell at wholesale for consumption outside New Mexico.

The net effect of this statutory scheme is obvious. Electricity generated and ultimately consumed in New Mexico is not subject to the economic burdens of the Energy Tax, while electricity transmitted for consumption in other states is taxed. The Energy Tax clearly and undeniably imposes a "greater tax burden on electricity . . . generated and transmitted in interstate commerce" within the meaning of the Tax Reform Act.

In its Opinion, the lower court held that the Energy Tax imposed an "additional," but not a "greater" tax burden upon electricity transmitted for consumption in other states, so that the provisions of the Tax Reform Act were inapplicable. 576 P.2d at 294. The apparent reasoning that led to this conclusion is flawed in several respects.

Initially, the conclusion presupposes that the question whether a tax is discriminatory within the meaning of § 391 is to be resolved by examining "the *entire tax structure* of a state as applied to the *particular commodity* which is taxed . . . ." 576 P.2d at 294 (emphasis in original).[7] Even assuming for the moment that this were the statutory test, the court's conclusion ignores the patent discrimination of New Mexico's tax structure against producers of electrical energy which is wholesaled for eventual consumption outside New Mexico, and effectively concedes that locally consumed energy bears none of the burden of the Energy Tax.

New Mexico's Gross Receipts Tax Act, §§ 72-16A-1, *et seq.*, NMSA 1953, applies with virtual uniformity to most *retail* sales of electricity in New Mexico, but does not apply at all to *wholesale* transactions. At the wholesale level, there is *no* New Mexico tax imposed on locally-consumed energy. The mandatory reimbursement for the "assigned credit" of § 9(C) will wholly erase any liability for the Energy Tax, and the Gross Receipts Tax is by its very terms inapplicable. On the other hand, the Energy Tax admittedly applies to energy sold at wholesale and transmitted in interstate commerce for consumption in other states.

More importantly, however, the reasoning of the New Mexico Supreme Court requires the addition to § 391 of critical language which Congress never enacted, in order to derive a test of discrimination which

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[7] The further conclusion that New Mexico's total tax structure on electricity is nondiscriminatory derives from the notion that the total tax burden on locally consumed energy is the 4% Gross Receipts Tax, while the total tax burden on energy consumed outside New Mexico is only 2% (converting the Energy Tax to its appropriate Gross Receipts Tax Equivalent).

Congress never intended.[8] Nowhere in § 391 is there any reference to a state's "total tax structure" with respect to electricity generated within its borders. To the contrary, the statute addresses itself to "*a tax* on or with respect to the generation or transmission of electricity," and contemplates inquiry only with respect to the operative effect of the single particular state tax challenged as discriminatory. The language "or indirectly" in § 391 does not suggest any different test of discrimination; it merely indicates that Congress meant to forbid discriminatory burdens imposed through indirection, such as by the credit provisions of the Energy Tax.

In effect, the lower court's approach makes the unlikely and improper assumption that Congress, in enacting § 391, engaged in the essentially unnecessary exercise of codifying existing decisional law. Even assuming that cases such as *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472 (1932), which considered a state's entire scheme of taxation in determining the existence of discrimination against interstate commerce, enunciate a viable constitutional precept, they are nevertheless inapposite here. Both the language of the Tax Reform Act and its legislative history establish Congressional

[8] A similar disregard for the precise language enacted by Congress is evidenced in a separate argument that has in the past been advanced. Thus, the State has argued that § 391 reaches only discriminatory taxes on "electricity generated . . . in interstate commerce" and is inapplicable, because all electricity is generated in intrastate commerce. (Motion, p. 13.) That is simply not what the statute says. The statutory definition of a discriminatory tax refers to "electricity which is generated *and transmitted* in interstate commerce." 15 U.S.C. § 391 (emphasis added). The transmission of electricity for consumption outside New Mexico, which is the only activity effectively burdened by the Energy Tax, clearly occurs in interstate commerce. *Fed'l Power Comm'n* v. *Florida*

condemnation of any individual tax which applies only to, or imposes a heavier burden upon, energy transmitted outside the taxing state. The judicial rules developed to define the limitations on state power imposed by the Commerce Clause have been occasioned by the need to preserve the free flow of interstate trade in the face of Congressional silence. *A & P Tea Co.* v. *Cottrell,* 424 U.S. 366, 370-71 (1976). Such rules were never intended to apply to situations, such as the present one, where Congress has unequivocally spoken.

The language of the Tax Reform Act is clear and unambiguous. Section 319 speaks of "*a tax* on or with respect to the generation or transmission of electricity," *not all taxes* or the *total tax structure.* Congress enacted a statute which, by its terms, invalidates any single state tax which is in fact discriminatory. There is no exculpation based upon other aspects of the state's tax structure. Nor is there any basis, either in the language of the Tax Reform Act or its legislative history, for the lower court's implicit assumption that Congress was merely engaged in the essentially unnecessary exercise of reconfirming doctrine previously enunciated by this Court. Indeed, the legislative history convincingly shows that Congress specifically intended to reach and proscribe the Energy Tax.[9]

Power & Light Co., 404 U.S. 453 (1972). The point is that the Energy Tax can be saved only by adding to § 391 language which Congress never enacted, or by deleting language which was in fact passed.

[9] At the very most, the lower court's statutory analysis indicates a minor degree of ambiguity in the language of § 391. In the face of such ambiguity, it becomes the task of this Court to construe the statute in a fashion which best effectuates the intent of Congress:

The provision that was to become § 391 was added by the Senate Finance Committee to the version of the Tax Reform Act passed by the House of Representatives (H.R. 10612). In its explanation of this addition, the Report of the Finance Committee clearly describes the Energy Tax as an example of the type of state taxation to be forbidden:

> *Reasons for change*
>
> The committee has learned that one State places a discriminatory tax upon the production of electricity within its boundaries for consumption outside its boundaries. While the rate of the tax itself is identical for electricity that is ultimately consumed outside the State and electricity which is consumed inside the State, discrimination results because the State allows the amount of the tax to be credited against its gross receipts tax if the electricity is consumed within its boundaries. This credit normally benefits only domiciliaries of the taxing State since no credit is allowed for electricity produced within the State and consumed outside the State. As a result, the cost of the electricity to nondomiciliaries is normally increased by the cost the producer of the electricity must bear in paying the tax. However, the cost to domiciliaries of the taxing State does not include the amount of the tax.
>
> The committee believes that this is an example of discriminatory State taxation which is properly within the ability of Congress to prohibit through its power to regulate interstate commerce.

S. Rep. No. 94-938-Part I, 94 Cong., 2d Sess. (1976) 437-38 (footnotes omitted), *reprinted in* [1976] U.S. Code Cong. & Admin. News, 3865-66 (App. 107-08).

In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.

Almost immediately following the report of the Finance Committee bill to the Senate, Senator Domenici of New Mexico proposed an amendment to strike this new section in its entirety. During the course of floor debate on this "Domenici Amendment," it was made quite clear that the section, if retained, would invalidate the Energy Tax. *See,* 122 Cong. Rec. S. 12712, *et seq.* (daily ed. July 28, 1976). The proposed "Domenici Amendment" was soundly defeated, and the Senate enacted the provision without change.

The Conference Committee which considered and resolved the differences between the Senate and House versions of the Tax Reform Act incorporated the section on discriminatory taxation, but changed the words "higher gross or net tax" to "greater tax burden" without further explanation. The Conference Report expressly states that it is adopting the Senate amendment to H.R. 10612. H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. (1976) 503, *reprinted in* [1976] U.S. Code Cong. & Admin. News 4206; S. Conf. Rep. No. 94-1236, 94th Cong., 2d Sess. (1976) 503 (App. 107). The Conference version was passed by both the House and Senate without further alteration.

As can be seen, 15 U.S.C. § 391 originated as a Senate amendment to the Tax Reform Act, which survived both Senate and House consideration substantively unscathed.[10] In his remarks during the debate on the

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United States v. *American Trucking Assoc., Inc.*, 310 U.S. 534 (1940). *Accord, United States* v. *Alpers*, 338 U.S. 680, 681-82 (1950); *United States* v. *Rosenblum Truck Lines*, 315 U.S. 50, 53 (1942). It was unquestionably the intent of Congress, in this instance, to prohibit imposition of New Mexico's tax.

[10] The State has previously suggested that § 391 did not become a part of the Tax Reform Act until that bill reached the House-

"Domenici Amendment," which would have stricken the provision in its entirety, Senator Fannin eloquently described the incipient national problem to which the provision was addressed:

> Mr. President, we are not talking about only Arizona and New Mexico. We are talking about what could happen all over the United States. We are talking about a potential taxing war on the sale of power which could be devastating.

122 Cong. Rec. S12713 (daily ed. July 28, 1976). While the potential problem was of national concern, all who considered this measure, whether favorably or unfavorably, agreed that the need for the legislation had been occasioned by an initial actual manifestation of the problem, in the form of the Energy Tax. While the legislation was in part designed to prevent the enactment of similar taxes in other states, there has never been any doubt that its major purpose was to invalidate the Energy Tax.

The construction accorded § 391 by the opinion below disregards this legislative history and renders it essentially meaningless. The lower court's contrived reading of the statute leads to the anomalous and improper result of rendering a Congressional statute inapplicable to the very situation which precipitated its passage. This Court has consistently held that such a result is improper:

> Where, as here, the language is susceptible of a construction which preserves the usefulness of the

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Senate Conference Committee, so that the Report of the Senate Finance Committee and the floor debate on the Domenici Amendment are irrelevant in determining Congressional intent. (Motion, pp. 14-15.) This curious conclusion proceeds from an erroneous premise. The legislative history discussed in this Brief is solely

> section, the judicial duty rests upon this Court to give expression to the intendment of the law.

Armstrong Paint & Varnish Works v. *Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938).

The State has never seriously disputed that the statutory provision in question, as reported by the Finance Committee and passed by the Senate, was intended to invalidate the Energy Tax. (Motion, pp. 14, 15.) In attempting to escape the effect of the statute's legislative history, the State has consistently relied on a presumed transformation of Congressional intent, supposedly evidenced by a minor language substitution made by the Conference Committee. That Committee, as noted earlier, did change the words "higher gross or net tax" in the Senate version, to "greater tax burden," the formulation eventually enacted. There is certainly nothing in the language selected by the Conference Committee which signifies a departure from the meaning or intent of the Senate-passed bill. There are no legislative materials to support the State's claim of a radical alteration of legislative purpose. Quite to the contrary, the Report of the Conference Committee unequivocally states that its version "follows the Senate amendment" and presumably its intent as well. H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. (1976) 503, *reprinted in* [1976] U.S. Code Cong. & Admin. News 4206; S. Conf. Rep. No. 94-1236, 94th Cong., 2d Sess. (1976) 503. (App. 107.)

The suggestion has also been made that the Energy Tax represents merely a reduction of New Mexico's

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that of the Tax Reform Act, and the provision that was to become § 391 was part of that bill well prior to the date of the Report of the Senate Finance Committee.

sales tax with respect to electricity and that Congress, in enacting § 391, did not intend to reach a simple recasting of New Mexico's tax structure. That is simply not, however, the legislation which New Mexico has enacted. This Court cannot rule on hypothetical taxes:

> We can only consider the legislation that has been had, and determine whether or not its necessary operation results in an unjust discrimination between the parties charged with its burdens.

Travelers' Ins. Co. v. *Connecticut,* 185 U.S. 364, 371 (1902). *Cf. also McLeod* v. *J. E. Dilworth Co.,* 322 U.S. 327, 330 (1944); *Stewart Dry Goods Co.* v. *Lewis,* 294 U.S. 550, 563 (1935).

The clear and unambiguous wording of 15 U.S.C. § 391 encompasses the New Mexico Electrical Energy Tax Act and prohibits its assessment. The statute's legislative history makes it abundantly clear that it was intended to achieve that result. The New Mexico Supreme Court's treatment of this issue makes it apparent that the Energy Tax may be saved only by rewriting either the Energy Tax or the Tax Reform Act, or both. That is clearly impermissible, and the decision below should be reversed on that basis alone.

II

THE ENERGY TAX IMPERMISSIBLY DISCRIMINATES AGAINST INTERSTATE COMMERCE.

Although it is literally a grant of legislative power to the United States Congress, it is now established that the Commerce Clause (Article I, Section 8, cl. 3 of the Constitution), of its own force, acts as a restriction upon the taxing powers of the states, even where Congress has not spoken. *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U.S. 318 (1977). Demarcation

by this Court of the precise boundaries of the limitations which the Commerce Clause imposes upon the taxing powers of the states has proceeded on a case-by-case basis and has always been a "troublesome area." *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 275 (1977). Nevertheless, this Court has never questioned what is perhaps the most fundamental principle that has evolved:

> No State may, consistent with the Commerce Clause, "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business."

Boston Stock Exchange v. *State Tax Comm'n, supra,* 429 U.S. at 329 (quoting *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 458 (1959)). "The conclusion is inescapable: *equal treatment for in-state and out-of-state taxpayers similarly situated* is the condition precedent" for a valid state tax on interstate transactions. *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64, 69-70 (1963) (emphasis added); *cf. also Best & Co.* v. *Maxwell,* 311 U.S. 454, 455-56 (1940).[11] Appellants respectfully submit that the Energy Tax quite clearly exceeds this constitutional restriction.

The discriminatory nature of the Energy Tax becomes readily apparent when one compares New Mexico's tax treatment of wholesale transactions involving electricity both before and after its enactment. Prior to passage of the Energy Tax, wholesale transactions of both interstate and local character were treated in

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[11] *Accord, Memphis Steam Laundry Cleaner, Inc.* v. *Stone,* 342 U.S. 389, 391 (1952); *Interstate Oil Pipe Line Co.* v. *Stone,* 337 U.S. 662, 666 (1949); *Nelson* v. *Sears, Roebuck & Co.,* 312 U.S. 359, 366 (1941); *Gregg Dyeing Co.* v. *Query, supra,* 286 U.S. at 476.

equivalent fashion—neither transaction was subject to the New Mexico Gross Receipts Tax or any other tax. With passage of the Energy Tax, however, if a utility generating electricity in New Mexico sells that electricity at the wholesale level to an entity that transmits it to another state for consumption, no credit arises and the Energy Tax must be paid. If, on the other hand, that electricity is wholesaled to a distributor or retailer who markets it for consumption in New Mexico, the provisions of Sections 9(B) and (C) insure that no tax burden will be incurred. The effect of Section 9(C) is to require a private rebate of a tax credit which entirely relieves a company generating and wholesaling power for consumption in New Mexico from any additional tax liability.[12]

The only characteristic which distinguishes wholesale sales for local consumption, which remain free of any tax burden, and wholesale sales for out-of-state consumption, which are subject to the Energy Tax, is the fact that the latter involve interstate commerce. This Court recently reaffirmed the principle that a state may not permissibly distinguish, for purposes of taxation, between a local and an interstate transaction, nor between local transactions "on the basis of some

[12] The statutory terminology is somewhat fictionalized. If the tax statutes of New Mexico are straightforwardly applied, the wholesaler of electricity incurs no Gross Receipts Tax liability, and has nothing against which to apply its Section 9(B) credit. Strictly speaking, then, the wholesaler has no "credit" to assign to its retailer customer under Section 9(C). To deal with this problem, regulations issued by the Bureau of Revenue refer to the wholesaler as acquiring a "potential credit" must be assigned to the retailer, who can take an actual credit if the energy is in fact resold to New Mexico consumers (Appendix III). Quite obviously, the Act itself refers to no such "potential credit" concept.

interstate element." *Boston Stock Exchange* v. *State Tax Comm'n, supra,* 429 U.S. at 332 n. 12. Even if both types of wholesale transactions are viewed as interstate in nature, the discrimination is nonetheless prohibited:

> There has been no prior occasion expressly to address the question whether a State may tax in a manner that discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses, but the clear import of our Commerce Clause cases is that such discrimination is constitutionally impermissible.

Boston Stock Exchange, 429 U.S. at 335.

There are other more subtle forms of discrimination involved as well. Because they transmit a greater portion of the electricity they generate in New Mexico for consumption in other markets than do local utilities, appellants will incur a far greater tax liability under the Energy Tax and will be placed at a competitive disadvantage in the wholesale market where they do compete with New Mexico-based utilities. A similar consequence can be anticipated at the retail level for EPE, which competes directly with local New Mexico utilities in uncertified areas in southern New Mexico (App. 51). It is clearly impermissible for a state to levy a tax which discriminates against interstate commerce "by providing a direct commercial advantage to local business . . . ." *Northwestern States Portland Cement Co.* v. *Minnesota, supra,* 358 U.S. at 458.

The discrimination of the Energy Tax against wholesale sales of power for eventual consumption in other states, however, is explicit. In *Halliburton Oil Well Cementing Co.* v. *Reily, supra,* this Court considered the application of a Louisiana use tax to specialized

oil well servicing equipment which was manufactured and assembled by the taxpayers in other states for use in Louisiana. In valuing this equipment for use tax purposes, Louisiana employed a method of computation that placed the taxpayers on the same footing as local companies who purchased the equipment at retail in Louisiana, but not with local entities who had purchased and assembled the equipment themselves. The Court enunciated the rule of "equal treatment for in-state and out-of-state taxpayers," 373 U.S. at 70, and held that Louisiana had used an invalid basis for comparison in applying it. As Halliburton was a "manufacturer-user," it had to be treated in the same fashion as would a local "manufacturer-user" rather than a local purchaser. In the present case, the appellants, interstate wholesalers, must be compared with local wholesalers and, when they are, the equality of treatment mandated by *Halliburton* is undisputably absent.

The opinion below simply ignores the undeniably discriminatory impact of the Energy Tax on wholesale transactions. That Court's observation that: "All producers *who retail their electricity* in New Mexico can take advantage of the credits provided in § 9," 576 P.2d at 295 (emphasis added), both makes and misses the point. The point missed is that the most invidious and direct discrimination of the Energy Tax occurs at the *wholesale* level, a circumstance which the lower court never even discusses. The point made is that the benefits of the credit provisions, which wholly expunge Energy Tax liability, are extended *only* to those whose transactions are localized within the State, leaving the entire burden of the Act to fall upon those engaged in interstate commerce. The Act's discriminatory impact cannot be justified by pretending it does not exist.

This discrimination against interstate transactions at the wholesale level cannot be masked or defended by characterizing the Energy Tax as one on the generation of electricity, which is said to be a separate local activity. The State has previously advanced this contention, relying principally upon *Utah Power & Light Co.* v. *Pfost,* 286 U.S. 165 (1932) (Motion, p. 8). Even assuming that the Energy Tax can be appropriately characterized as one upon the generation of electricity, that will not absolve its discriminatory features. As is discussed in greater detail in the succeeding section of this Brief (see pp. 36-37, *infra*), the *Pfost* decision, as well as other decisions of this Court concerning severance or production taxes, holds only that a production tax uniformly applied does not offend the Commerce Clause. That proposition is irrelevant here, where the tax is imposed *only* if the goods produced (electricity) are marketed and consumed outside New Mexico.

Perhaps in recognition of this difficulty, the State has also argued, and the lower court held, that the Energy Tax is in fact on the commodity of electricity and that inquiry must be made of New Mexico's total tax structure with respect to electricity to ascertain whether the Energy Tax is discriminatory. That inquiry is of no assistance to the State's position. Analysis of New Mexico's total tax structure reveals that a wholesale sale of electricity for local consumption is subject to no tax burden whatsoever, while a similar sale of electricity for consumption in other states is subject to the Energy Tax. That is clearly discriminator and violates the rule of equal treatment announced in *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64 (1963).

This patent discrimination against interstate transactions at the wholesale level remains undisputed. As noted, the New Mexico Supreme Court simply ignored the issue. The State's only response has been that: "It is hard to see why special significance is attached to wholesale transactions." (Motion, p. 9.) The record, however, shows that the wholesaling of electricity is a separate and significant sphere of economic activity for appellants and their New Mexico utility competitors (App. 20-23, 38, 44, 48, 50, 55, 61, 68).[13] New Mexico simply cannot be heard to contend that the wholesaling of electricity is of no importance. After all, the elaborate credit assignment-reimbursement mechanism created by § 9(C) of the Act was specifically designed to insure that locally-consumed electricity did not incur any Energy Tax liability at the wholesale level. Even were the argument available to New Mexico, there is no *de minimis* defense to violations of the Commerce Clause.

None of the cases previously cited by the State, or relied upon by the lower court, are to the contrary. In *Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), the Court found that freezer ships taking salmon for canning and sale in other states were subject to a 4% tax, while local canneries paid a tax of 6%. There was no discrimination between local and interstate concerns engaging in the same economic activity. *So. Carolina Power Co.* v. *So. Carolina Tax Comm'n,* 52 F.2d 515 (E.D. S.C. 1931), *aff'd per curiam,* 286 U.S. 525 (1932), involved a state tax on the production and sale of electricity

[13] During 1975, wholesale power sales by appellants to the Public Service Company of New Mexico alone totalled 3,720,000 kwh (App. 38, 44, 55, 68).

which allowed a credit against the sales tax for any production tax previously paid. The challenge was made on a variety of bases, but the issue of discrimination was raised only by an entity that sold in South Carolina power produced in other states. The court found no discrimination against such imported power, and there was no claim made, as here, of a discrimination against exported power.

In its discussion of the discrimination question, the lower court cites only *Public Utility District No. 2* v. *State,* 82 Wash.2d 232, 510 P.2d 206, *appeal dismissed,* 414 U.S. 1106 (1973), which is entirely inapposite. In that case, several Washington utilities argued that the proceeds from the sale of power to Oregon utilities had been improperly included in computation of Washington's gross income tax. In the particular sales which had been taxed, the energy had been sold at wholesale at the local utilities' switchyards in Washington, whence it was transmitted to the Oregon utility purchasers by the Bonneville Power Administration.

The tax in question permitted the utilities to deduct the proceeds from sales in interstate commerce and the proceeds from wholesale sales for resale in Washington. The court found that the latter deduction was to avoid "pyramiding" with the state's retail tax on electricity, and that it was neither arbitrary nor discriminatory to deny a similar deduction with respect to the sales in question.

The deductions permitted by the Washington tax are in no way comparable to the "credit" provisions of the Energy Tax. Initially, the purpose of the deduction allowed by the Washington tax for wholesale sales for local consumption was to avoid double taxation of the

same transaction, and not to insulate local utilities from the burden of a tax which falls entirely upon interstate commerce, which is the stated purpose of the Act's credit provisions. More significantly, a similar deduction was available for interstate sales, which is not the case with New Mexico's credit provisions. In short, there was no issue of discrimination against interstate commerce involved in the litigation.

As for the sales which had been taxed in that case, it was established that both the sale and the delivery of the power in question had taken place in Washington. Interstate commerce was not involved. *Public Utility Dist. No. 2* simply holds that a state may properly tax the sale of power which is generated, sold, and delivered within its borders. That has no bearing on the present case. The Energy Tax concededly discriminates against interstate transactions in electricity at the wholesale level.

No case has been, or can be, cited which sustains the validity of the Energy Tax. The pretense that New Mexico has simply reduced its gross receipts tax on the retail sale of electricity to 2%, while taxing all generation of electricity at 2%, is just that. The Energy Tax cannot be saved by rewriting it as a hypothetical alternative tax which may or may not survive constitutional scrutiny. The tax which New Mexico actually seeks to impose falls only upon interstate transactions, and that the Commerce Clause does not permit.

III

THE ELECTRICAL ENERGY TAX IMPOSES MULTIPLE BURDENS ON THE INTERSTATE TRANSMISSION AND CONSUMPTION OF ELECTRICITY.

In its decision in *Gen'l Motors Corp.* v. *Washington,* 377 U.S. 436 (1964), this Court identified a separate source of constitutional concern where a facially nondiscriminatory state tax is applied to transactions involving interstate commerce:

> Because every State has equal rights when taxing the commerce it touches, there exists the danger that such taxes can impose cumulative burdens upon interstate transactions which are not presented to local commerce. 377 U.S. at 440.

Cf. also Standard Pressed Steel Co. v. *Washington Rev. Dept.,* 419 U.S. 560 (1975); *J. D. Adams Manufacturing Co.* v. *Storen,* 304 U.S. 307 (1938); *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250 (1938). Where that danger becomes a reality, as here, the tax on the interstate transaction is unconstitutional.

Formalistic labels aside for the moment, the Energy Tax indisputably places an economic burden upon electricity generated within New Mexico, and that burden will be borne by that electricity until it reaches its point of consumption. Because of the credit provisions of the Act, its economic burden falls solely upon electricity transmitted for consumption in other states.

During the course of the proceedings below, it was shown that the same electricity which bears the exclusive burden of the Energy Tax becomes subject to additional taxation when it reaches the state where it is to be consumed (App. 39, 45, 56, 63, 69, 78-83). In 1975 alone, the appellant utilities paid the following

amounts in taxes, attributable to electricity generated in New Mexico, to state and local jurisdictions where that electricity was consumed:[14]

APS —	$ 6,327,853
EPE —	398,638
SPR —	1,153,378
SCE —	2,299,963
TGE —	3,436,133
Total—	$13,615,965

This showing of actual multiple taxation of electricity transmitted in interstate commerce for consumption in other states remains uncontroverted.

The lower court again avoids this issue of multiple taxation by characterizing the Energy Tax as one on the generation of electricity, which, it reasons, only occurs in New Mexico and can only be taxed by New Mexico. 576 P.2d at 296. This particular conclusion reflects the ambivalence which characterizes that court's attempt to categorize the Energy Tax in a fashion that will eliminate its constitutional infirmities. The Act's concededly discriminatory impact is defended by arguing that the tax is on the commodity of electricity, and that the State's entire taxing structure for that commodity is non-discriminatory. When this is shown to result in multiple taxation of a good transmitted in interstate commerce, the Energy Tax is defended as one on the activity of generation, which is localized and can only be taxed by New Mexico. The inconsistency is apparent.

[14] (App. 56, 62, 78-83.) None of these taxes allow any credits, offsets, or rebates for amounts of Energy Tax payable with respect to that power (App. 39, 45-46, 56-57, 62-63, 70).

The court's principal reliance for characterization of the Energy Tax as one on generation is upon *Utah Power & Light Co.* v. *Pfost,* 286 U.S. 165 (1932), in which this Court held that generation of electricity was a local activity separable from its subsequent interstate transmission. The result in *Pfost* is consistent with decisions of this Court concerning severance or production taxes in other economic areas. *Cf. Hope Natural Gas Co.* v. *Hall,* 274 U.S. 284 (1927) (natural gas production); *Oliver Iron Mining Co.* v. *Lord,* 262 U.S. 172 (1923) (iron ore extraction); *Heisler* v. *Thomas Colliery Co.,* 260 U.S. 245 (1922) (anthacite coal extraction); *American Mfg. Co.* v. *St. Louis,* 250 U.S. 459 (1919) (manufactured goods).

Pfost and its antecedents establish only that a state production tax uniformly applied does not offend the Commerce Clause. In none of these "production tax" cases, however, was there any contention that the levy discriminated against interstate commerce. No prior decision has upheld, under the Commerce Clause, a production tax which applied only to goods shipped for consumption outside the taxing state; yet that is the essential feature of the tax New Mexico has imposed on electricity produced within its borders.

Perhaps more importantly, this Court has previously emphasized that, in this area, the focus of analysis must be on the practical operation of a tax, rather than on abstract formulas or legal labels by which it may be explained, characterized, or described. *Cf. Best & Co.* v. *Maxwell, supra,* 311 U.S. at 455-56. The Energy Tax is simply not properly classified as a production or severance tax. By its very terms, the Energy Tax is imposed not upon the generation of power, but upon "the *privilege* of generating electricity in this state

for the purpose of sale." § 72-34-3, NMSA 1953 (1975 P.S.) (emphasis added). Moreover, the economic impact of the Energy Tax does not fall upon all generation of electricity for sale. In its practical operation, the Act applies only where the taxed privilege is exercised "for the purpose of sale" *outside New Mexico.*

At the point of generation, it cannot be ascertained, with any degree of certainty, whether any Energy Tax liability will attach or the amount of tax that will have to be paid. To the contrary, because of the "potential credit" recognized by the Bureau of Revenue's own regulations, neither liability for nor the amount of the Energy Tax can be ascertained until it is determined where the generated electricity will be transmitted and consumed. The practical operation of the Act's credit provisions delays the incidence of the Energy Tax beyond the point of production to the point of sale and consumption.[15]

The Act is closely analogous to the Texas tax on the occupation of "gathering gas" which this Court invalidated in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157 (1954). That tax was measured by the volume of gas "taken," and its incidence was held to be "on the exit of gas from the State"—a point beyond the step where production had ceased and transmission in interstate commerce had begun. The constitutional infirmity was that every state through which the line passed could impose a similar levy and "resurrect the

[15] In *Hope Natural Gas Co.* v. *Hall, supra,* this Court cautioned that its approval of the tax on production of natural gas might be withheld, if the measure or incidence of the tax was dependent upon events occurring after the gas entered the stream of interstate commerce. That is precisely what the Energy Tax does.

customs barriers which the Commerce Clause was designed to eliminate." 347 U.S. at 170.

The Energy Tax carries the vice perceived in *Michigan-Wisconsin* at least one impermissible step further. In *Michigan-Wisconsin,* the tax in question purported to apply equally to gas which moved both in intrastate and interstate commerce. The Energy Tax does not make that pretense. Here, it is *only* interstate transmission and consumption of electricity that incurs any monetary liability by reason of the Energy Tax. Moreover, while the Texas tax was invalidated because it would "permit a multiple burden" upon interstate commerce, 347 U.S. at 170, here multiple state taxation of the electricity in question is not potential but real.

IV

THE ENERGY TAX EXTENDS NEW MEXICO'S TAXING POWERS BEYOND THE LIMITS PERMITTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In a variety of analogous contexts involving state taxation with interstate ramifications, this Court has suggested that both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment independently impose a geographic limitation upon the permissible exercise of the taxing power of a state. The undisputed facts of the present case reveal a purposeful and successful effort by New Mexico to exceed that limitation.

In *Nashville, Chattanooga & St. Louis Railway* v. *Browning,* 310 U.S. 362 (1940), this Court considered the application of a state's *ad valorem* property tax to the rolling stock of an interstate railroad, and held that, in applying such a tax, the state must employ a

formula that fairly estimates the amount of such property with a taxable *situs* within the state, because:

> In tapping these common sources of revenue a state cannot, we have held, use a fiscal formula, whatever may be its appearance of certitude, to project the taxing power of the State plainly beyond its borders. 310 U.S. at 365.

While *Nashville, Chattanooga* was decided on the basis of the Commerce Clause, when the identical issue was once again presented, the Court indicated its view that the Due Process Clause imposed the very same limitation:

> The taxation of properly not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to "project the taxing power of the State plainly beyond its borders."

Norfolk & Western Railway v. *Missouri State Tax Comm'n,* 390 U.S. 317, 325 (1968) (quoting *Nashville, C. & St. L. R. Co.* v. *Browning, supra*).

Nor, the Court has indicated, is this a rule confined in its application to state property taxes. In *Evco* v. *Jones,* 409 U.S. 91 (1972), this Court invalidated the application of the New Mexico Gross Receipts Tax to a transaction that took place in another state, because "a tax levied on the gross receipts from the sales of tangible personal property in another State is an impermissible burden on commerce." 409 U.S. at 93. *Cf. also American Oil Co.* v. *Neill,* 380 U.S. 451 (1965); *Conn. Gen'l Life Ins. Co.* v. *Johnson,* 303 U.S. 77 (1938).

The economic burden of the Energy Tax falls solely and exclusively upon electricity generated in New Mexico but consumed elsewhere, while sparing locally consumed electricity from any additional tax burden. This disparate impact is neither inadvertent nor fortuitous. The legislative history makes clear that the Energy Tax was conceived, designed, and principally defended as a measure that would collect revenues solely from the residents of other states, and was carefully tailored to avoid placing any tax burden whatsoever on the residents of New Mexico.

The Act originated as S.B. 258, introduced and cosponsored by Senator Aubrey Dunn, which imposed a tax on generation of electricity at the rate of one-half mill ($.0005) per kilowatt hour (Rec. 390, 598).[16] The Bureau of Revenue Bill Review Report on the measure described the impact of the proposed tax, through the use of a chart which compared the tax's projected effect on average residential electricity bills in most New Mexico cities, and in Denver, El Paso, Phoenix, Santa Monica, and Tucson. This chart indicated that, while the tax would increase electricity bills for consumers in

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[16] The State has in the past disputed the propriety of consideration of the Act's legislative history, arguing that the Energy Tax cannot be invalidated on the basis of the legislature's motivations. (Motion, p. 20.) The argument misses the point. The legislative history of the Energy Tax merely serves to confirm that its entirely extraterritorial impact comports with the intention of the New Mexico legislature. In *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U.S. 318 (1977), this Court considered statements issued by the President of the New York Stock Exchange and the Governor of New York to support its conclusions as to the discriminatory nature of the New York tax involved. 429 U.S. at 323, 327 nn. 7, 10. Quibbling over the pertinence of the Act's legislative history tacitly concedes that it has been accurately described.

other states, it would produce no such increase in charges within New Mexico (App. 75; Rec. 602, 607, 612). The chart was cited throughout the course of legislative consideration as a reason for the measure's enactment (Rec. 419, 458-59).

The first hearings were held by the Corporations Committee of the New Mexico Senate, at which time Senator Dunn introduced a Senate Corporations Committee Substitute for Senate Bill 258, which added, *inter alia,* what is now Section 9(C) of the Act (Rec. 395-400, 410). The Commissioner of Revenue was then introduced to explain the operation and effect of the bill. After describing the operation of the "credit provisions" of the bill, the Commissioner informed the Committee of his conclusion that "the customer would see no difference in his billing in New Mexico" (Rec. 448), and that "the taxpayer in California or the consumer in California would bear the brunt of the tax" (App. 72; Rec. 449).

The bill was next considered by the Senate Finance Committee on March 5, where Senator Dunn again stated that "there will be very little possibility of any of this being passed on to the New Mexico consumer" (App. 72; Rec. 456). At that hearing, however, the question was raised whether the credit provisions would always produce a "washout" of Energy Tax liability, and it was discovered that, in the case of at least one New Mexico utility (later identified as Southwestern Public Service Company), application of the credit provisions would leave some net Energy Tax liability, which might be passed on to New Mexico residents (App. 76; Rec. 487).

By the time the measure reached the floor of the Senate for debate, this problem had been cured by a

Senate Finance Committee Substitute bill, which reduced the tax rate to four-tenths of a mill ($.0004) per kilowatt hour (Rec. 402, 608). In a memorandum to Senator Dunn, dated March 10, 1975, the Commissioner of Revenue explained the reason for, and the effect of, this change:

> Under the generation tax rate of ½ mill per KWH, of all the utilities in New Mexico, it appeared that only Southwestern Public Service Company might have to pass some generation tax on to New Mexico consumers. It appears that the amendment to 4/10 of a mill brings down the generation tax so that even in Southwestern's case the gross receipts tax more than offsets the generation tax. (App. 76; Rec. 614.)

This Senate Finance Committee Substitute was then debated in the Senate on March 11, where Senator Dunn explained it in the following fashion:

> [A]nd the idea behind it, Mr. President, is that we levy this generating tax and we allow the generating companies to take credit for the gross receipts tax which they collect on this power as they sell it, against this particular amount of generation tax. When this is done, Mr. President, it forms a washout which allows that most of the tax could be passed on in almost 99.9 per cent of the time to the residents of Arizona and California. (App. 73; Rec. 512.)

Senator Dunn further explained that the tax rate had been reduced to eliminate the one situation identified where the burden of the tax might fall on New Mexico consumers (Rec. 514-15). The bill was approved by the Senate, and the New Mexico House of Representatives thereupon took up its consideration.

The theme of the legislative history of the Act in the House was identical to that developed in the Senate. In an appearance before the House Taxation and Revenue Committee, Senator Dunn described the intent which had motivated its passage by the Senate:

> Mr. Chairman, the main idea behind this is that the generator who is responsible for this tax may apply against that tax the gross receipts which he collects. Mr. Chairman, I think this is a very important part of it. And in almost one hundred per cent, but not in every case, I'd hasten to say that there would be hardly any taxation on the individual consumer in the State of New Mexico, in this particular area. (App. 73, Rec. 524.)

At a subsequent point in the course of the same hearing, Senator Dunn stressed the fact that "this particular tax was for the consumer, Mr. Chairman, for the consumer in Arizona and for the consumer in California" (App. 73; Rec. 584).

The bill was approved by the Taxation and Revenue Committee and reported to the House, where it was sponsored by Representative Lopez, who had opposed prior attempts to impose generation taxes. Representative Lopez explained his change of heart to his colleagues in the following fashion:

> I find myself in the unique position this year, Mr. Speaker, of having to support a measure of this nature. As you all know, for the last four years, I've stood up in opposition to the imposition of this sort of tax. But my opposition was based on the fact that there was no way to impose the tax without placing a burden on the New Mexico taxpayer or utility user. However, this year a device has been worked out whereby there is a credit in it and the tax will be paid by out-of-state residents with no additional burden on our New Mexico residents. So, for that reason I stand before you today supporting this bill and carrying it. (App. 73-74; Rec. 588.)

Cf. also 122 Cong. Rec. S. 12714 (daily ed. July 28, 1976) (Rec. 753). The bill was, of course, passed by the House, and the Energy Tax became effective on July 1, 1975.

This brief description of its legislative history demonstrates that the Energy Tax was conceived and designed for the explicit purpose of deriving tax revenues from residents of other states. In every instance where the possibility was discovered that some portion of the tax burden might fall on New Mexico residents, the bill was rapidly amended to avert it. Initially, Section 9(C) was added to accommodate the local wholesaler who could not take full advantage of the Section 9(B) credit. When it was nevertheless discovered that there was one local utility that might suffer some net Energy Tax liability, the rate of tax was reduced to avoid that result. New Mexico has never seriously disputed that the Act does serve its intended purpose—it imposes a greater tax burden *only* upon electricity transmitted to and consumed in other markets. In the prophetic words of Senator Dunn, the Act's sponsor, this is a tax "for the consumer in Arizona and for the consumer in California" (App. 73; Rec. 584.)

In *Austin* v. *New Hampshire,* 420 U.S. 656 (1975), this Court considered the constitutionality of a "commuter income tax" imposed on the incomes of nonresidents earned in New Hampshire. While the taxing statute also purported to reach the income earned in other states by New Hampshire residents, the Court noted that certain exemptions from the tax created a

situation where "in effect, then, the State taxes only the income of nonresidents working in New Hampshire," 420 U.S. at 659, and held the tax unconstitutional.

While the decision in *Austin* was based upon the Privileges and Immunities Clause of Article IV, cl. 1, of the Constitution, that clause was viewed as one designed to preserve "the structural balance essential to the concept of federalism." 420 U.S. at 662. The Commerce and Due Process Clauses serve precisely the same concern. Moreover, the Energy Tax is at least as serious a manifestation of the states' "centrifugal tendency," 420 U.S. at 660, as was the New Hampshire "commuter tax," and equally deserving of repudiation.

The considerations underlying enactment of the Energy Tax are perhaps understandable, but nonetheless constitutionally impermissible. It is not at all surprising that a taxing body should seek to shift the burden of its revenue collections to non-constituents. Similarly, New Mexico's apparent desire to capitalize upon or preserve natural resources located within its borders by natural accident which facilitate the generation of electricity is not a novel phenomenon. *Cf. Baldwin* v. *Seelig,* 294 U.S. 511 (1935); *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923). Preservation of the national economic structure envisioned by the Constitution requires that these essentially parochial tendencies be confined to the bounds required by our Federal system. Those bounds are clearly exceeded by the Energy Tax.

V

THE ACT INTERFERES WITH THE CONSTITUTIONAL POLICIES PROTECTED BY THE IMPORT-EXPORT CLAUSE.

While the limitations imposed by the Commerce Clause upon the states' power to tax are qualified in

nature, that is not the case under the Import-Export Clause (Art. I, Section 10). "By its own terms, the prohibition on taxation contained in the Import-Export Clause is absolute . . ." *Kosydar* v. *Nat'l Cash Register Co.,* 417 U.S. 62, 65 (1974). *Cf. also Richfield Oil Corp.* v. *State Bd. of Equalization,* 329 U.S. 69 (1946). The analysis required to determine in what circumstances this absolute ban on state taxation is to be applied, however, has undergone a significant transformation in recent years.

Prior to the decision of this Court in *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276 (1976), the crux of the constitutional inquiry was whether particular goods or commodities subjected to the challenged tax were in fact imports or exports. With respect to imports, the "original package" doctrine of *Brown* v. *Maryland,* 12 Wheat. 419 (1827), prevailed, which held that an imported good retained its status as such so long as it remained in its original imported package. *Cf. also Dept. of Revenue* v. *Beam Distilling Co.,* 377 U.S. 341 (1964). Where an alleged tax on exports was involved, the inquiry was whether the goods taxed had commenced their final, continuous journey to a foreign destination. *Kosydar* v. *Nat'l Cash Register, supra.*

In *Michelin Tire Corp.* v. *Wages,* this Court rejected the "original package" doctrine with respect to imports and sustained a nondiscriminatory state *ad valorem* property tax as applied to imported inventories. In the process, the Court indicated that future inquiry would not be concerned with classifying taxed goods as imports or exports, but with determining whether the tax levied was an "Impost or Duty." This latter inquiry was to be answered by consideration of the poten-

tial impact of a state tax upon the three policy considerations which the Clause serves:

> 1) Preserving the ability of the federal government to exclusively and uniformly regulate commercial relations with foreign governments.
>
> 2) Preserving the integrity of import revenues as a source of funds for the federal government.
>
> 3) Prevention of the interstate friction and rivalry that might ensue were the coastal states (or other states with ports of entry) permitted to take advantage of favorable geographical locations and enact protective tariffs.

The scope of the analysis required where exports were claimed to be improperly taxed was further clarified in *Dep't of Revenue* v. *Assoc. of Wash. Stevedoring Companies,* —— U.S. ——, 98 S.Ct. 1388 (1978), where this Court held that the Clause was not offended by the application of a state business and occupation tax to stevedoring operations. The Court noted that, where exports were involved, the second of the policy considerations identified in *Michelin* (the preservation of federal revenues) was inapplicable, for "the Constitution forbids federal taxation of exports." 98 S.Ct. at 1403. The Court concluded that "any tax relating to exports can be tested for its conformance with the first and third policies." *Ibid.*

Where a state tax on exports is involved, the body of constitutional doctrine to be consulted must be viewed as evolving in every sense of the word. There has not been opportunity for this Court to expand upon the process of analysis commenced in *Wash. Stevedoring Companies.* It is significant, however, that in both *Michelin* and *Wash. Stevedoring Companies,* the Court expressly declined to express its views as to the propriety, under the Import-Export Clause, of a state tax on goods in transit to a foreign country. That is precisely the issue presented here. At least one of the appellant utilities generates electricity in New Mexico for sale and consumption in the Republic of Mexico (App. 25, 48, 50). The statutory incidence of the Energy Tax is on the generation of electricity *for sale,* and its actual economic incidence is governed by its point of eventual consumption. In either event, New Mexico has delayed the imposition of its Energy Tax to a point beyond where production has ceased and the process of interstate transmission has begun. With respect to the electricity transmitted to and consumed in Mexico, the Energy Tax is in a very real sense imposed upon a good in transit to that foreign nation. Analysis reveals that the Energy Tax quite clearly impacts upon the policies fostered by the Import-Export Clause.

In *Michelin,* this Court found that the Georgia property tax there involved would not impinge on the Federal government's governance of commercial affairs with foreign countries because it did not "fall upon imports as such because of their place of origin." 423 U.S. at 286. Quite the opposite is true here. To the extent the Energy Tax falls upon electricity transmitted for consumption in Mexico, it does so because of that electricity's place of destination. In *Michelin,* all the property taxed was located, at the time the tax was imposed, within the State of Georgia. In *Wash. Stevedoring,* all the services taxed were performed in the State of Washington. In both settings, that fact reduced the possible disruption of foreign commercial affairs to an acceptable constitutional minimum, and the policy considerations involved were not disturbed. Those policies would clearly be undermined, however,

by permitting states to selectively impose taxes on goods in transit to foreign markets, from which locally-consumed goods are effectively exempt.

With respect to the remaining consideration, the inquiry required is essentially identical to that under the Commerce Clause. As the Court noted, "the desire to prevent interstate rivalry and friction does not vary significantly from the primary purpose of the Commerce Clause." *Wash. Stevedoring, supra,* 98 S.Ct. at 1401. That desire is frustrated where one state is permitted to impose a tax on goods produced within its borders which is only levied if the goods are transported to a sister state or foreign nation.

In *Wash. Stevedoring,* the Court identified four independently applicable safeguards which would vindicate the policy of preserving interstate harmony: "Fair taxation will be assured by *the prohibition on discrimination* and the requirements of apportionment, nexus, and reasonable relationship between tax and benefits." *Id.,* 98 S.Ct. at 1405 (emphasis added). The Energy Tax quite obviously cannot meet the initial portion of this test. As has been explained earlier, the Energy Tax, whether viewed in isolation or as part of New Mexico's total tax structure with respect to electricity, imposes a discriminatory burden upon electricity transmitted outside New Mexico for consumption, and that violates the principal requirement established by this Court for a permissible tax.

To summarize, the Energy Tax does fall upon goods destined for consumption in a foreign nation, and does so precisely because of that foreign destination. Were the electricity to be consumed in New Mexico, as has been shown, the burden of the Energy Tax would be wholly and automatically lifted. New Mexico's taxing

scheme imposes a discriminatory burden on electricity generated in New Mexico, but transmitted to the Republic of Mexico for consumption. To that extent, the Energy Tax represents an Impost or Duty proscribed by the Import-Export Clause.

CONCLUSION

In upholding the Energy Tax, the New Mexico Supreme Court has sustained the principle that a state may validly impose an excise upon the exit from its borders, for sale and consumption in other states, of products locally produced. That unprecedented, and erroneous, proposition has been enunciated, moreover, in the face of an explicit Congressional prohibition against imposition of the Energy Tax and other state taxes of similar import and design. For the reasons stated above, this Court should declare New Mexico's Electrical Energy Tax void and unconstitutional, and vacate the lower court's opinion.

Respectfully submitted,

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APPENDIX

APPENDIX I

Provisions of United States Constitution Involved

Article I, Section 8, clause 3 (the "Commerce Clause"):

[The Congress shall have Power] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Article I, Section 10 (the "Import-Export Clause"):

. . . No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: . . .

Article VI, clause 2 (the "Supremacy Clause"):

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XIV, Section 1 (the "Due Process Clause"):

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX II

The Electrical Energy Tax Act

CHAPTER 263

AN ACT

RELATING TO TAXATION; IMPOSING A TAX ON THE GENERATION OF ELECTRICITY; AMENDING SECTIONS 45-4-28 and 72-13-24 NMSA 1953 (BEING LAWS 1939, CHAPER 47, SECTION 28 AND LAWS 1965, CHAPTER 248, SECTION 12, AS AMENDED); ENACTING A NEW SECTION 72-16A-16.1 NMSA 1953. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. *Short Title.* Sections 1 through 6 of this act may be cited as the "Electrical Energy Tax Act." [§ 73-34-1, NMSA 1953 (1975 P.S.)]

Section 2. *Definitions.* As used in the Electrical Energy Tax Act:

A. "bureau" means the New Mexico bureau of revenue;

B. "generation" includes manufacture and production;

C. "electricity" includes electrical energy and electrical power;

D. "person" means any individual, estate, trust, receiver, cooperative association, electric cooperative, club, corporation, company, firm partnership, joint venture, syndicate, association, irrigation district, electrical irrigation district and any utility owned or operated by a county or municipality, and also means to the extent permitted by law, any federal, state or other governmental unit or subdivision or an agency, department or instrumentality; and

E. "sale" means selling or transferring to any person for consumption, use or resale and includes barter and exchange. [§ 72-34-2, NMSA 1953 (1975 P.S.)]

Section 3. *Imposition of Tax-Rate-Denomination As Electrical Energy Tax.*

A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

B. The tax imposed by this section shall be referred to as the "electrical energy tax." [§ 72-34-3, NMSA 1953 (1975 P.S.)]

Section 4. *Measurement and Recording of Kilowatt Hours of Electricity.* Persons subject to the imposition of the electrical energy tax shall maintain accurate measuring devices and records to measure and record the daily and cumulative monthly and yearly totals of kilowatt hours of electricity generated or distributed in this state. [§ 72-34-4, NMSA 1953 (1975 P.S.)]

Section 5. *Reports-Remittances.* Every person subject to the imposition of the electrical energy tax shall file a return on forms provided by and with the information required by the bureau and shall pay the tax due on or before the twenty-fifth day of the second month following the month in which the taxable even occurs. [§ 72-34-5, NMSA 1953 (1975 P.S.)]

Section 6. *Relief From Other Taxes.* Unless otherwise specified by statute the imposition of the electrical energy tax shall not act to relieve any person or activity from any other tax levied by the State of New Mexico or its political subdivisions. [§ 72-34-6, NMSA 1953 (1975 P.S.)]

Section 7. Section 45-4-28 NMSA 1953 (being Laws 1939, Chapter 47, Section 28, as amended) is amended to read:

"45-4-28. *Taxation.* Cooperative and foreign corporations, transacting business in this state pursuant to the

provisions of Section 45-4-1 through 45-4-32 NMSA 1953 shall pay annually, on or before July 1, to the state corporation commission, a tax of ten dollars ($10.00) for each one hundred persons or fraction thereof to whom electricity is supplied within this state which tax shall be in lieu of all other taxes except those provided in the Gross Receipts and Compensating Tax Act, and the Electrical Energy Tax Act; provided, however, that in the event a contract has been entered into by a rural electric cooperative and a power consumer prior to February 1, 1961, and such contract does not contain an escalator clause providing for an increase for added tax liability on the cooperative, then the sale to such power consumer shall be exempt until the expiration, extension or renewal of the contract."

Section 8. Section 72-12-24 NMSA 1953 (being Laws 1965, Chapter 248, Section 12, as amended) is amended to read:

"72-13-24. *Receipts—Disbursements-Distribution.*

A. All money received by the bureau shall be deposited with the state treasurer before the close of the next succeeding business day after receipt of the money.

B. Money received or disbursed by the bureau shall be accounted for by the commissioner as required by law or regulation of the director of the department of finance and administration.

C. Disbursements for tax credits, refunds and the payment of interest shall be made by the department of finance and administration upon request and certification of their appropriateness by the commissioner or his delegate. The state treasurer shall create a suspense fund for the purpose of making the disbursements authorized by the Tax Administration Act. All revenues collected pursuant to the provisions of Sections 72-15-1 through 72-15-37 NMSA 1953, the Income Tax Act, the Withholding Tax Act, the Gross Receipts and Compensating Tax Act and the Electrical Energy Tax Act shall be credited to this suspense fund and are appropriated for the purpose of making disbursements for tax credits, refunds and the payment of interest.

D. On the last day of each month, any money remaining in the suspense fund after the necessary disbursements have been made shall be identified by tax source and transferred from the suspense fund, one-half of the receipts attributable to the electrical energy tax shall be transferred to the "electrical energy fund," hereby created, and the remainder to the state general fund, except that before the remaining money is transferred to the general fund, an amount equal to one percent of the taxable gross receipts reported for the month of deposit:

(1) for each municipality shall be distributed to each municipality; and

(2) by taxpayers who have business locations on an Indian reservation or pueblo grant in an area which is contiguous to a municipality and in which the municipality performs services pursuant to a contract between the municipality and the Indian tribe or Indian pueblo shall be distributed to the municipality if:

(a) the contract describes the area in which the municipality is required to perform services and requires the municipality to perform services that are susbtantially the same as the services the municipality performs for itself; and

(b) the governing body of the municipality has submitted a copy of the contract to the commissioner of revenue.

E. Disbursements to cover expenditures of the bureau shall be made only upon approval of the commissioner or his delegate.

F. Miscellaneous receipts from charges made by the bureau to defray expenses pursuant to the provisions of Section 72-13-23 and 72-13-39 NMSA 1953 and similar charges are appropriated to the bureau for its use."

Section 9. A new Section 72-16A-16.1 NMSA 1953 is enacted to read:

"72-16A-16.1. *Credit-Gross Receipts Tax.*

A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit."

Section 10. *Legislative Intent.* It is the intent of the legislature that this entire 1975 act be considered not severable, and should any part hereof be declared unconstitutional, the entire act should be declared void. [not codified]

Section 11. *Effective Date.* The effective date of the provisions of this act is July 1, 1975. [not codified]

APPENDIX III

G.R. REGULATION 16.1:1—CREDIT OF ELECTRICAL ENERGY TAX ON ELECTRICITY GENERATED IN NEW MEXICO AGAINST GROSS RECEIPTS TAX—

A. For purposes of the credit against gross receipts tax, "consumption or consumed" also includes that quantity of electricity lost through the transmission and distribution process which occurs in New Mexico.

B. Section 72-16A-16.1(C) requires that a potential credit be assigned to persons purchasing electricity for resale:

1) to buyers who will potentially consume or use the electricity in New Mexico, or

2) to buyers who will potentially resell the electricity for consumption in New Mexico;

on which an electrical energy tax or similar tax has been levied by New Mexico, by another state or by political subdivision thereof and paid by the seller.

Each seller of electricity as described in this paragraph must assign, to each buyer described in subparagraphs (1) and (2) of this paragraph, a pro rata share of the total available potential credit provided in Section 72-16A-16.1 (A) or (B).

C. It shall be presumed that the potential credit against gross receipts tax as provided by Section 72-16A-16.1(C) shall have been assigned when the buyer is in receipt of an invoice from the seller separately stating the amount of the applicable Electrical Energy Tax or similar tax as provided in Section 72-16A-16.1.

In the absence of bad faith, a wholesale purchaser in New Mexico of electricity may rely upon such an invoice in claiming a credit under Section 72-16A-16.1.

D.

1) That portion of the potential credit assigned to a buyer further reselling the electricity for consumption in New Mexico may be credited by the assignee against the gross receipts tax due New Mexico on receipts from the sale of electricity for any month subsequent to July 1, 1975.

2) That portion of the potential credit assigned to a buyer further reselling the electricity at wholesale to buyers who will resell the electriicty for consumption in New Mexico must be reassigned to the subsequent buyer as provided in paragraph B of this regulation.

3) That amount of electrical energy tax credit which is not assigned to appropriate buyers and which is otherwise creditable under Section 72-16A-16.1, may be credited against gross reecipts tax due New Mexico on receipts from the sale of electricity for any reporting month subsequent to July 1, 1975.

E. To be allowable the credit must be claimed within the period provided in Section 72-13-40(B). Reflecting a credit on the taxpayer's CRS-1 return or attachment thereto will be treated as a claim for credit.

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,

Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO,

Appellees.

On Appeal From The Supreme Court of New Mexico

BRIEF OF APPELLEES

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Appellees.

On Appeal From The Supreme Court of New Mexico

BRIEF OF APPELLEES

OPINIONS BELOW

The Memorandum Opinion of the District Court of the First Judicial District, Santa Fe County, New Mexico, is not reported and appears in Appendix A of the Jurisdictional Statement. The Opinion of the Supreme Court of New Mexico is reported in *Arizona Public Service Co. v. O'Chesky*, 91 N.M. 485, 576 P.2d 291 (1978), and appears in Appendix B

of the Jurisdictional Statement. No other written opinions have been delivered.

JURISDICTION

The opinion of the Supreme Court of New Mexico was issued and filed on March 23, 1978 (App. 3). The jurisdictional statement was filed in this Court on June 21, 1978, and the appeal was docketed on that date. This Court noted probable jurisdiction on October 10, 1978. The Court has jurisdiction under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The appellants challenge the validity of the New Mexico Electrical Energy Tax, reprinted herein in relevant part in Appendix A, under the following constitutional provisions, set forth herein in pertinent part in Appendix B: The commerce clause, *U.S. Const.* art. I, § 8, cl. 3, the import-export clause, *id.*, art. I, § 10, cl. 2, and the due process clause. *Id.* amend. XIV, § 1. In addition, the appellants challenge the New Mexico tax under § 2121(a) of the Tax Reform Act of 1976, 90 Stat. 1914, 15 U.S.C. § 391, which is as follows:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section, a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

QUESTIONS PRESENTED

1. Does the New Mexico electrical energy tax discriminate against interstate commerce either under the commerce clause or under 15 U.S.C. § 391?

2. Does the New Mexico electrical energy tax violate either the due process clause of the 14th amendment or the import-export clause of the Constitution?

STATEMENT OF THE CASE

This is a challenge to the validity of New Mexico's tax on the generation of electric power by several public utility companies which generate electricity in New Mexico and sell most of it in other states. The essential charge against the tax is that it discriminates against interstate commerce. The residents of New Mexico who consume electric power produced there pay, in fact, approximately twice as much tax on electricity as New Mexico charges those who transmit the power out of state. New Mexico achieves this result by way of a credit system of some intricacy which is the basis of the appellants' contention that the tax discriminates against interstate commerce. The details of the New Mexico tax, the nature of the appellants' production of electricity in New Mexico, the consequences of that production in New Mexico, and the proceedings in the lower courts are set out below.

Additionally, Congress enacted a statute, contained in the Tax Reform Act of 1976, which relates to state taxes on the generation and transmission of electricity in interstate commerce. While that Act will be alluded to in the statement of the case, a discussion of its legislative history is reserved to the argument portion of this brief.

A. *The New Mexico Generation Tax.*

The New Mexico statute, the Electrical Energy Tax Act of 1976, N.M. Stat. Ann. § 72-34-1, 1975 N.M. Laws § 1, (Appendix A of this brief) is deemed, "a tax on the generation of electricity."[1] The operative portion of the tax, § 3, imposes a tax of 4/10 of 1 mill on each net kilowatt hour of electricity generated in New Mexico. Expressed as a percentage of the average retail price of electricity generated by the appellants in New Mexico, the tax is imposed at a rate of less than 2%. Throughout the proceedings in the courts below, the 2% figure has been referred to as the measure for the rate of tax imposed by the Electrical Energy Tax (R. 986; App. 147 (Opinion of the New Mexico Supreme Court)). Appellants have never disputed this figure.

This 2% tax on generation applies to all electric power generated in New Mexico and consumed in New Mexico as well as to all electricity generated in New Mexico and consumed elsewhere. All generators of electricity are required to pay it. However, New Mexico also imposes a 4% gross receipts tax, equivalent to a sales tax, on all retail sales occurring within the state. N.M. Stat. Ann. §§ 72-16A-3(F),

[1]New Mexico was clearly bringing its generation tax within declared constitutional boundaries for such a tax as established by the Court in *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932). In *Pfost*, the Court upheld a state tax on the generation of electricity, holding that the generation of electricity was essentially a local occurrence and that the commerce clause did not prevent a state from taxing its manufacture or creation. *Id.* at 181, 52 S. Ct. at 552. The Court also stated that although electricity, once generated, was almost immediately transmitted for eventual consumption, the generation of electricity constituted a separate operation from the transmission of electrical power. *Id.* at 179-81, 52 S. Ct. at 551-52. *See generally* R. 799 and 801.

72-16A-3(I), and 72-16A-4.[2] The legislative history surrounding the passage of the New Mexico generation tax clearly shows that the state legislature did not wish to increase the total tax burden on electricity, which would be passed through from the generators of electricity to the retail sellers of electricity to the consumers, beyond a 4% level. Consequently, when the New Mexico Legislature adopted the 2% generation tax it, in substance, reduced the sales tax on retail sales of electricity to consumers from 4% to 2%.

The precise method by which this reduction is achieved is contained in § 9 of the tax act. Under § 9(B), the New Mexico generator of electricity which is consumed within New Mexico is allowed a credit equal to the tax on generation imposed by § 3 against the state retail sales tax.

However, since the transaction between the generator of electricity and the first purchaser of electricity, the wholesale buyer,[3] is a wholesale transaction and is not subject to the retail sales tax, the generator of electricity is unable to apply this credit against the retail sales tax. The wholesale generator of power would undoubtedly pass along the generation tax to his wholesale buyer as a portion of the electricity's total cost. In turn, the wholesale buyer would further pass along the generation tax to his retail customers. This pass-through process would ultimately cause the New Mexico consumer to assume a total tax burden on electricity

[2]In addition to the 4% gross receipts tax (hereinafter referred to as a retail sales tax) New Mexico municipalities and counties are authorized to impose taxes on retail sales occurring within their boundaries. N.M. Stat. Ann. §§ 14-61-3, 15-55-1. Thus, as a result, in certain areas of New Mexico, the total tax on retail sales may be slightly greater than 4%.

[3]The wholesale buyer of electricity is also the retail seller of electricity.

greater than 4%. In order to prevent this, § 9(C) of the act provides that the credit established against the retail sales tax must be assigned to the wholesale buyer of electricity who then reimburses the wholesale generator of the electricity for the credit.

In sum, under the New Mexico generation tax, all generators of electricity, whether they generate electricity for final consumption in New Mexico or elsewhere, pay the 2% generation tax. The net functional effect of the credit/reimbursement provisions, taken as a whole, is to reduce the retail sales tax on electricity which must be paid by the New Mexico consumer to 2%. Thus, the *total* tax burden on the New Mexico consumer of electric power is 4%: Two percent is attributable to the state retail sales tax and 2% is attributable to the generation tax on electrical power which is ultimately passed down the distribution line from the wholesale generator to the electrical consumer. The clear purpose of the credit/reimbursement arrangement is to prevent the stacking or pyramiding of taxes on electricity which would have to be paid by the New Mexico consumer.

In an obvious effort to achieve equality, § 9(A) of the act also makes this same credit pattern applicable to electricity generated outside of New Mexico but consumed within New Mexico. In this situation, the amounts paid by a generator of electricity may be credited against the retail sales tax due New Mexico.

B. *The Production of Electricity in New Mexico and Its Consequences.*

Since there may be an argument as to the legitimacy of New Mexico's interest in taxing the production of electricity within its borders, a record has been made bearing on this point.

The electricity producing area of New Mexico is commonly referred to as the Four Corners area, the northwest corner of the state where the states of New Mexico, Arizona, Colorado and Utah meet. Two power plants have been constructed there. An abundant supply of low-cost coal is located nearby which is used to produce the electric power generated at these plants (R. 792). However, this is accomplished at a cost of considerable pollution. For example, emissions of particulates, sulphur dioxide, and nitrogen oxides from the generation plant at the Four Corners station amounted, in 1976, to approximately one-quarter billion pounds a year and created frequently hazy conditions (R. 823). The pollution has washed out the color quality of the landscape, has prevented the detection of features in the land, and has resulted in a general haze over the New Mexico vistas which have been historically known for their depth, clarity, and color (R. 822, 834, 916). What was once the brightest air in America has now become a sewer in the sky. In short, there is now smog over Four Corners (R. 834).

The power generated in the Four Corners area goes in very small part to New Mexico.[4] The bulk is transmitted to Arizona, Southern California, and Texas. If the appellants were unable to obtain or to generate electricity in New Mexico, they would have to increase their business costs by a minimum of one hundred and twenty-four million dollars a year in order to obtain an equivalent supply of electricity generated at their power plants located outside of New Mexico (R. 792).

[4]Approximately 80% of the electricity generated by the appellants at the Four Corners and San Juan generating plants is transported outside of New Mexico (R. 792).

The construction and operation of the generating plants has also caused the population to expand and has resulted in increased costs to local and state government. The record contains estimates of added costs and capital outlays of between 145 and 245 million dollars depending on various population projections (R. 848). Additionally, it has been projected that approximately 33 million dollars will be needed to make road improvements (R. 848-49). The annual costs to local governmental agencies which must expand to accommodate the increased population have been estimated as amounting to 24 to 40 million dollars (R. 849).

The generation of electricity in New Mexico by the appellants constitutes a significant portion of the electrical power furnished by them to their customers (App. 33, 41, 53, 59). In particular, two of the appellants, Arizona Public Service Company, and El Paso Electric Company, attribute over 35% of their aggregate generating capacity to power generated in New Mexico (App. 33 and 41). The total kilowatt hours produced by the appellants, for example, in July, 1975, were approximately 936,958,752 KWH. The generation tax owed by appellants on this electricity is approximately $376,697.90 (App. 38-39, 45, 56, 62).[5]

C. *Proceedings Below.*

After adoption of the New Mexico tax, the State of Arizona applied in this Court for leave to file an original action against New Mexico challenging the tax. This Court declined jurisdiction, preferring to have the matter come up through the New Mexico courts by direct appeal as has now happened.

[5]The appellants were allowed by the District Court of Sante Fe County to protest the New Mexico generation tax without payment (App. 39, 45, 56, 62, 69).

Arizona v. New Mexico, 425 U.S. 794, 96 S. Ct. 1845, 48 L. Ed. 2d 376 (1976). This Court noted that the essential problem was whether the credit provision of the New Mexico tax somehow discriminated against interstate commerce. The matter thereupon proceeded in the New Mexico state courts and considerable uncontroverted factual information was presented by all parties.

On cross-motions for summary judgment, the trial court, following the Washington Supreme Court's decision in *Public Utility District No. 2 of Grant County v. State*, 82 Wash. 2d 232, 510 P.2d 206, *appeal dismissed for want of substantial federal question*, 414 U.S. 1106, 94 S. Ct. 833, 38 L. Ed. 2d 734 (1973), found that the "whole scheme of taxation"[6] on the generation and sale of electricity in New Mexico imposed a total tax of 2% on electricity generated in New Mexico and transmitted in interstate commerce and a total tax of 4% on electricity generated in New Mexico and consumed in New Mexico and that, therefore, there was no discrimination against interstate commerce. The court stated that the functional effect of the credit/reimbursement provisions of the tax was to reduce the local retail sales tax on electricity to 2% and that this violated neither the commerce clause nor 15 U.S.C. § 391.[7] The Supreme Court of New Mexico,

[6]This phrase, and the approach to determining whether a state tax discriminates against interstate commerce which it describes, was adopted by the New Mexico District Court from the Washington Supreme Court's opinion in *Public Utility District No. 2 of Grant County v. State, supra.* That court, in turn, had adopted that phrase and that approach from several decisions of this Court which had analyzed state taxes. Notably, these decisions included *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 83 S. Ct. 1201, 10 L. Ed. 2d 202 (1963). See section III, *infra*.

[7]Section 391, as part of the Tax Reform Act of 1976, was passed by Congress in the midst of the proceedings before the New Mexico District Court. Appellants filed a motion for summary judgment be-

affirming, devoted fuller attention to 15 U.S.C. § 391. That court found that upon consideration of the entire tax structure of New Mexico there was no direct or indirect greater tax burden on electricity generated and transmitted to other states than on electricity generated and transmitted in New Mexico.

This appeal followed.

SUMMARY OF ARGUMENT

15 U.S.C. § 391 prohibits any state or political subdivision of a state from imposing a "greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." The State of New Mexico has enacted a tax on the generation of electricity at a rate of 2%. The total tax burden imposed by New Mexico on electricity generated and transmitted within New Mexico is 4 to 4½%. The total tax burden imposed by New Mexico on electricity generated and transmitted in interstate commerce is 2%.

It really is that simple. As the record shows, one of the appellants, a principal Arizona utility, sought federal legislation which would invalidate the New Mexico generation tax. However, this utility was unable to obtain this result without also invalidating taxes on the generation of electricity imposed by other states whose senators would not support such legislation.

In consequence, the Arizona interest was compelled to settle for a statute, 15 U.S.C. § 391, which was simply

fore that court on September 15, 1976 (R. 328). The Tax Reform Act was signed by President Ford on October 4, 1976. Consequently, the appellants filed a supplemental motion for summary judgment bringing the passage of § 391 to the district court's attention (R. 737).

declarative of constitutional provisions concerning interstate commerce. The utility's lobbyist recognized this problem and attempted to obtain a legislative history to overcome the "dozen arguments" which he anticipated would reveal the truth of what had happened—that 15 U.S.C. § 391 was, in fact, sterile legislation.

The lobbyist obtained much legislative history. But, Congress does not pass legislative history, it passes laws. This law adds nothing to the constitutional test.

As a matter of constitutional law, the electrical energy tax does not discriminate against interstate commerce. Indeed, intrastate commerce is the subject of discrimination. Arguments concerning the due process clause of the 14th amendment or the import-export clause of the Constitution are especially inconsequential here because they are based on the same false premise of discrimination.

The New Mexico electrical energy tax is a manufacturing tax, a tax on the generation of electricity. It is applied to all generators of electricity within New Mexico and, were it not for this appeal, all generators would pay it. The tax is now being paid on electricity generated and transmitted within New Mexico. The fact that New Mexico, in substance, has reduced its retail sales tax to consumers on electricity is its privilege.

We deal here with the entire western power grid. If utilities importing electricity into New Mexico are subject to a generation tax on that electricity, the New Mexiço electrical energy tax allows these utilities to obtain the same credit against the retail sales tax applicable to electricity generated and sold within New Mexico.

New Mexico's interest is clear. The utilities are generating

electrical power in New Mexico from coal located near their generating plants. This New Mexico cannot stop; it can only endure the dirt, the pollution, and the enormous social costs resulting from the appellants' operations. Meanwhile, the utilities are able to sell the electricity, obtain millions of dollars from these sales, and supply distant communities, more populous than all of New Mexico, with "clean energy." New Mexico, however, is left to suffer the consequences. Clearly, the appellants' activities within New Mexico have given that state a substantial taxable nexus.

ARGUMENT

I. *Introduction.*

The appellants would have this Court believe that this case is simply a label case. Repeatedly, the appellants call the New Mexico tax on the generation of electricity discriminatory, and of course, describing the tax as discriminatory makes it invalid. The issues in this case, however, cannot be answered by resorting to labels. The hard decision presented by this appeal concerns the scope of the focus used to analyze the New Mexico generation tax. If one looks at only the New Mexico tax and credit provisions without taking into account the relationship of that tax to New Mexico's retail sales tax, then the tax may discriminate against interstate commerce. On the other hand if one focuses on the fact that the total tax burden imposed by the state of New Mexico on electricity consumed in New Mexico is 4% and the total tax burden imposed by New Mexico on electricity consumed elsewhere is 2% then, clearly, there is no discrimination against interstate commerce and if anything, there is reverse discrimination against intrastate commerce.

The problem in this case is to choose the focus. New Mexico rests fundamentally on the functional approach.

II. *The Federal Statute Does Not Bar This Tax.*

During the debate in Congress on the measure which eventually became 15 U.S.C. § 391, the generation taxes of two states, Washington and West Virginia, were frequently compared and contrasted with the New Mexico tax. Senator Fannin of Arizona as a spokesman for one of the appellants, Arizona Public Service, sought federal legislation to invalidate the New Mexico tax. His initial efforts to draft a bill which would invalidate the New Mexico tax conflicted with views of senatorial titans representing the taxing interests of West Virginia and Washington. The result was that Senator Fannin's initial attempts to invalidate all state taxes on the manufacture or generation of electricity was watered down before becoming 15 U.S.C. § 391.

Whether the labor of the mountains brought forth a lion or a mouse is to be determined by this decision.

A. *The Legislative History.*

The New Mexico Electrical Energy Tax passed on April 10, 1975. In the spring of that same year, Senator Fannin introduced Senate Bill 1957, a measure which did not pass, but which became the grandfather of 15 U.S.C. § 391. The core portion of that bill, contained in § 2, prohibited the enforcement of any state tax "imposed on or with respect to the generation of electricity within such State, to the extent that such electricity is transmitted to and consumed outside of such State." S. 1957, 94th Cong. 1st Sess. § 2 (1975).

This measure clearly prohibited all manufacturing or generating taxes on electricity transmitted in interstate commerce. We do not pause with the controversy as to whether Congress had the power to adopt such a statute, because it did not pass.[8] Without doubt, this measure was directed, as expressly stated by Senator Fannin, at "New Mexico's recently enacted Electrical Energy Tax Act . . . ." 95 Cong. Rec. S 10729 (daily ed. June 17, 1975). At the hearing on Senate Bill 1957, Senator Fannin could not have been more explicit in explaining the purpose and effect of Senate Bill 1957: "Senate Bill 1957 prohibits State taxation on . . . the generation of electricity within a state to the extent that the electricity is transmitted to and consumed outside of the State. . . ." *State Taxation on the Generation of Electricity: Hearing on S. 1957 before the Subcommittee on Energy of the Committee on Finance*, 94th Cong., 2nd Sess. 5 (1976).

In making this far-reaching proposal, Senator Fannin, however, had reached further than the Senate would permit. The West Virginia tax as it then existed fell squarely upon the manufacture of electricity and would have been invalidated if Senate Bill 1957 had passed. *Id.* at 68-69.

Several utility companies which generated electricity in West Virginia for transmission to other states, accordingly, supported Senate Bill 1957. Representatives of these utilities

[8] In the interest of brevity, we have not reargued the question of the constitutionality of § 391 on the assumption that it does not in any event reach the New Mexico tax. However, we do not waive this point and, therefore, in the alternative, incorporate our argument as made in our Motion to Dismiss or Affirm at pages 17-19. The statute, as a single shot effort by Congress to invalidate the New Mexico generation tax is neither within Congress' power to regulate interstate commerce nor is a reasonable and appropriate device to reach any goal which the commerce clause allows. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964).

asserted at the hearing that West Virginia's manufacturing tax discriminated against out-of-state consumers because electricity generated and taxed in West Virginia was also subject to sales taxes imposed in the states where the energy was finally sold. This, they contended, imposed a higher total tax burden on electricity sold out of state than on electricity sold within West Virginia. *Id.* at 32 and 65. These witnesses also testified that taxes on electrical energy, such as that imposed by West Virginia, would inhibit or discourage power companies from uniting and building power plants designed to service consumers located in other states. *Id.* at 83-84 and 67.

In close parallel to West Virginia, the State of Washington also imposed a manufacturing tax on electricity. Wash. Rev. Code Ann. § 82.04.240. The Director of the Washington State Department of Revenue submitted a statement to the subcommittee opposing Senate Bill 1957. In her statement, the Director explained that Senate Bill 1957 would discriminate in favor of utilities by exempting them from a manufacturing tax which everyone else in Washington paid, regardless of the fact that their products moved in interstate commerce. *Id.* at 79.

Not only was Senate Bill 1957 opposed by representatives of the States of West Virginia and Washington, but a representative of the State of New Mexico also spoke in opposition to the bill at the hearing:

> The [New Mexico] generation tax must be read together with the gross receipts tax. Receipts from the sale of electricity at retail in New Mexico are taxed at the minimum rate of 4 percent. In most populated areas the rate of the tax is 4-1/2 percent. For example in Santa Fe, the seller is taxed at 4 percent as a state gross receipts tax, one-fourth of 1 percent as municipal gross receipts tax and one-fourth of 1 percent as

a county gross receipts tax.

> The Electrical Energy Tax Act was designed to avoid pyramiding of taxation of electricity sold in New Mexico. The legislature provided that the electrical energy tax may be credited against the gross receipts tax. Indeed it provided that any generation tax, whether levied by New Mexico or a sister state, could be credited against the gross receipts tax. In this manner New Mexicans would not be forced to pay more than 4 1/2 percent tax on the electricity they consume. *Id.* at 43.

As a result of this opposition, Senate Bill 1957 never moved out of the Senate Finance Committee. One need not read deeply between the lines to perceive that the appellants were unable to obtain a bill achieving their desired objective over the opposition of Senators Byrd and Randolph of West Virginia and Senators Magnuson and Jackson of Washington. The task of the proponents of federal legislation, therefore, required the drafting of a bill which would walk between the perils, leaving the Washington and West Virginia taxes alone, but at the same time invalidating the New Mexico tax. The opportunity to make this effort came with § 1323 of the Tax Reform Bill of 1976, which, as it emerged from the Senate Finance Committee provided in pertinent part:

> SEC. 201(a) No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation of electricity for transmission in interstate commerce which is discriminatory against out of State manufacturers, producers, wholesalers, retailers or consumers of that electricity. For purposes of this section a tax is discriminatory that either directly or indirectly results in the payment of a higher gross or net tax on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce. H.R. 10612, 94th Cong., 1st Sess. S. 1323 (1976).

Whereas Senate Bill 1957 had prohibited any tax on the

manufacture or generation of electricity to be transmitted in interstate commerce, this new proposal prohibited only such taxes as were "discriminatory against out-of-State" users. This required a definition of discrimination, and one was provided by the following language: "[A] tax is discriminatory that either directly or indirectly results in the payment of a higher gross or net tax on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." The Finance Committee report shows a purpose to strike down the New Mexico tax. S. Rep. No. 94-938, 94th Cong., 2nd Sess. 437-38, *reprinted in* [1976] *U.S. Code Cong. & Ad. News* 3439, 3865-67. Both New Mexico Senators, Domenici and Montoya, offered an amendment on the Senate floor to strike this version, but their efforts proved unsuccessful. 114 Cong. Rec. 512717 (daily ed. July 18, 1976).

The Tax Reform Act of 1976, containing § 1323 in the form described above, passed in the Senate on August 6, 1976. 121 Cong. Rec. S 13797 (daily ed. August 6, 1976).[9] The Tax Reform Act was sent to a conference committee composed of members of the House and Senate (including Senator Fannin). *Id.* at S 13799. The only significant change in § 1323 made by the conference committee was to the definition of discrimination. The language in the version of § 1323 passed by the Senate which had found a generating tax on electricity discriminatory if it resulted in a higher gross or net tax on electricity was omitted and the following carefully diluted language was substituted:

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[9]When passed by the Senate, § 1323, had been renumbered as § 1322. For purposes of this brief, however, it will be referred to as § 1323.

> [A] tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.[10]

Our statutory question, therefore, is, does the New Mexico tax result "either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce" than on the same product generated and transmitted in intrastate commerce? We contend that the answer is No. While we have no doubt that Senator Fannin was seeking to invalidate the New Mexico tax, in avoiding the opposition of West Virginia and Washington he moved so far from his original objective as to defeat his purpose. Senator Fannin's initial attempt, contained in Senate Bill 1957, to invalidate the New Mexico tax became the subject of radical surgery designed to preserve West Virginia's and Washington's taxes on the generation of electricity, but to strike down New Mexico's. The result of that surgery was § 1323. However, in drafting § 1323, Senator Fannin was unable to wield his legislative scalpel with sufficient precision. Consequently, § 1323 became the subject of further surgery. The creation of this operation became 15 U.S.C. § 391, an innocuous statute which on its face merely reiterates the test of discrimination against interstate commerce developed by this Court. But, in working for the passage of 15 U.S.C. § 391, Senator Fannin, as advised by a lobbyist for one of the appellants, was able to orchestrate the legislative history. The lobbyist hoped this would obfuscate the actual language of the statute drafted as a result of congressional compromise and adjustment.

[10]The Tax Reform Act of 1976, containing section 1323, as amended by the Senate-House Conference Committee, was approved by both Houses of Congress on September 16, 1976. Both Houses also approved a concurrent resolution, H. Con. Res. 751, 94th Cong. 2nd Sess. (1976) which renumbered § 1323 as § 2121.

We realize that the lobbyist for Arizona Public Service Company received exactly what he asked for when we see his letter to Senator Fannin contained in the appendix at page 85. The lobbyist, fully recognizing the power of Senator Byrd, concluded that the phrase "gross or net" tax as contained in the version of § 1323 passed by the Senate would invalidate the West Virginia tax and thought that this hazard would be avoided by using the phrase "greater tax burden on electricity.

The representatives of West Virginia apparently considered the "gross or net" language fatal because their tax on the manufacture of electricity was on the gross proceeds of the electricity's sale and, as pointed out previously in this brief, the opponents of the West Virginia tax contended that it resulted in a higher total tax burden on electricity because local retail sales taxes were imposed on it in other jurisdictions. In consequence, the "gross or net" language played directly into the hands of those persons in West Virginia who were seeking to invalidate the West Virginia tax. The phrase "greater tax burden on electricity," charming for its imprecision, escaped the shibboleth quality which had been attached to "gross or net" by supporters of the West Virginia tax.

The trouble with all this is that it destroyed the bill. A tax on the generation of electricity in one state which is later retailed in another state subject to a sales tax will have a higher "net tax" than would be the case if there had been no generation tax. Hence, Arizona's utility lobbyist was compelled to throw in the sponge, insert an almost meaningless phrase in the statute, and aspire to a legislative history which would give a meaning where there was none. The utility's lobbyist made the instant problem clear when he

informed Senator Fannin, "[f]inally, it is imperative that a clear legislative history be made. Without it, we could probably dream up another dozen arguments that it does not apply to the generation tax in New Mexico."

We are left, in short, with a statute which the utility's lobbyist clearly recognized would not necessarily invalidate the New Mexico generation tax—there would be a "dozen arguments that it does not apply." Since they could not get the law they wanted, they sought to obtain a legislative history in its stead.[11]

This is a bold attempt to nullify the legislative process by substituting a legislative history, which the utility could control, for an actual statute which it could not control. This is a manipulation which cannot succeed. Legislative history can clarify a statute, *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 96 S. Ct. 1938, 48 L. Ed. 2d 434 (1976); *United States v. Donruss Co.*, 393 U.S. 297, 89 S. Ct. 501, 21 L. Ed. 2d 495 (1969), but it cannot change it. See *Gemsco v. Walling*, 324 U.S. 244, 65 S. Ct. 605, 89 L. Ed. 921 (1945), where this Court rejected a party's attempt to contradict the terms of a statute by reference to legislative history:

> The argument from the legislative history undertakes, in effect, to contradict the terms [of the statute] by negative inferences drawn from inconclusive events occurring in the course of consideration of the

[11] In fact, the appellants may not even have actually obtained the legislative history they wanted. With respect to the meaning of the phrase "greater tax burden" contained in 15 U.S.C. § 391, the legislative history is singularly silent. There is absolutely no discussion in the legislative history or Senate debate on 15 U.S.C. § 391 concerning how the test incorporated in that section changed or modified the constitutional test for discrimination against interstate commerce.

> various and widely differing bills which finally, by compromise and adjustment between the two Houses of Congress, emerged from the conference as the Act. The plain words and meaning of a statute cannot be overcome by a legislative history which, though strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. *Id.* at 260, 65 S. Ct. at 614-15.

See also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971) (when legislative history is ambiguous, court must look primarily to statute to find legislative intent).

Congress does not pass legislative history, it passes laws. This law passed by Congress does not invalidate the New Mexico tax.

We do not need a "dozen arguments" that 15 U.S.C. § 391 does not invalidate New Mexico's tax. Instead, only one is necessary—and, simply, that argument is that New Mexico's tax does not result, either directly or indirectly, in a greater tax burden on electricity generated and transmitted in interstate commerce than on electricity generated and transmitted in intrastate commerce.

B. *The Generation Tax Does Not Impose a Greater Tax Burden on Electricity Generated and Transmitted in Interstate Commerce.*[12]

As has been detailed above, the total tax burden imposed

[12] Section 391 precludes a tax which "is discriminatory . . . directly or indirectly." Appellants make nothing of the term "indirectly" and we do not dwell on it. This is because the tax challenged is the New Mexico tax on the generation of electricity, and there could not be any more a direct tax than this; there is no element of indirection in the tax from either point of view. Whether there is discrimination, "directly," "indirectly," or not at all, depends upon how the Court will evaluate the reduction of the New Mexico sales tax on electricity.

by New Mexico on electricity generated and transmitted within that state is 4%. All electricity generated and transmitted in New Mexico is subject to the generation tax and this tax is passed down the line of distribution from the wholesale generator to the ultimate consumer. The credit/reimbursement provisions of § 9 of the tax, considered as a whole, reduce the retail sales tax on electricity which must be paid by the New Mexico consumer to 2%. Thus, the total tax burden on electricity generated and transmitted in New Mexico is 4%: 2% is attributable to the state retail sales tax and 2% is attributable to the generation tax on electrical power. In contrast, the total tax burden imposed by New Mexico on electricity generated and transmitted in interstate commerce is only 2%.

In attempting to sustain their argument that the New Mexico tax imposes a greater burden on interstate commerce in spite of these facts, appellants contend that since the language of § 391 speaks of "*a tax* on or with respect to the generation or transmission of electricity," consideration may only be given to the New Mexico generation tax and not to the manner in which this tax fits into the total scheme of taxation imposed by New Mexico on the generation of electricity. Appellants' argument, however, is plainly inconsistent with their own analysis of the New Mexico tax and is clearly contrary to the express language of 15 U.S.C. § 391.

Throughout their brief, appellants have asserted that the credit/reimbursement provisions of § 9 cause a greater tax burden to be imposed on electricity generated and transmitted in interstate commerce than on electricity generated and transmitted in intrastate commerce. In order for appellants to sustain this argument they must examine the operation of the credit/reimbursement provisions by taking into account the wholesale and retail taxes on electricity imposed

by New Mexico.[13] In short, they must regard the "scheme as a whole." They must take "the whole scheme of taxation into account." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69, 83 S. Ct. 1201, 1204, 10 L. Ed. 2d 202 (1963).

Appellants must look not merely to the tax on generation (which is imposed on all generators of electricity at the 2% rate), but must look to the tax "on electricity generated and transmitted in interstate commerce," which is precisely what the federal statute commands. Once we look to the tax on electricity, we must look to the entire tax on electricity. Appellants cannot pick out the particular provisions of the tax on which they rely and omit all those provisions relating to electricity which harms their claim. By taking the New Mexico tax into account, as a whole, the tax imposed by New Mexico on the generation and transmission of electricity is 4%, while the tax imposed by New Mexico on the generation and transmission of electricity sold elsewhere is only 2%. The "greater tax burden" rests on the intrastate and not on the interstate generation and transmission of electricity.[14]

Had Senator Fannin's original attempt to invalidate all state taxes on the generation of electricity passed, as contained

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[13] The credit/reimbursement provisions of § 9 are contained in the gross receipts and compensating tax provisions of the New Mexico statutes. N. Mex. Stat. Ann. §§ 72-16A-1 and 72-16A-16.1. Thus, simply as a matter of construction, the New Mexico generation tax and the credit/reimbursement provisions contained in § 9 of the Electrical Energy Tax Act must be examined along with the wholesale and retail taxes on electricity imposed by New Mexico for their operation to make any sense.

[14] The test for discrimination under 15 U.S.C. § 391 is whether a tax imposes a *greater or larger* burden on interstate commerce, not whether a tax imposes an *additional* burden. While the appellants are now subject to a generation tax on electricity which they were not required to pay before passage of the New Mexico tax, payment of the tax does not impose a greater or larger tax burden on electricity transmitted out-of-state. All generators are required to pay the New Mexico tax.

in Senate Bill 1957, there would have been a tremendous substantive change in the law on this subject; *Utah Power & Light Co. v. Pfost* would have been overruled. However, the statutory language actually passed by Congress contains only a declaration that no state may pass a tax which imposes a greater burden on the generation and transmission of electricity in interstate commerce than on intrastate commerce. This statute is declarative of current constitutional principles with respect to the commerce clause. Appellants' entire argument that the statute goes farther than this is based on legislative history which representatives of the appellants could control and which, by way of embroidery, goes farther than the sponsors of 15 U.S.C. § 391 could obtain in the statutory language.

We therefore face the question of the constitutional principles which apply.

III. *The New Mexico Tax is Valid Under the Commerce Clause.*

The commerce clause of the United States Constitution, as this Court has recognized, restricts the power of the states to regulate interstate commerce. *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 97 S. Ct. 599, 50 L. Ed. 2d 514 (1977). Nevertheless, this Court has also repeatedly recognized that the commerce clause does not "eclipse the reserved 'power of the States to tax for the support of their own governments.' " *Id., quoting Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 199, 6 L. Ed. 23 (1824). The mere fact that a person carries on business in interstate commerce does not exempt that person from state taxation. As this Court has stated, it was not the purpose of the commerce clause to relieve those engaged in interstate commerce from carrying a fair share of the costs of state government in

return for the benefits they have received from the state. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S. Ct. 1076, 1083, 51 L. Ed. 2d 326 (1977); *Colonial Pipeline Co. v. Traigle,* 421 U.S. 100, 108, 95 S. Ct. 1538, 1543, 44 L. Ed. 1 (1975); *Northwestern States Portland Cement Co. v. State of Minnesota,* 358 U.S. 450, 462, 79 S. Ct. 357, 364, 3 L. Ed. 2d 421 (1959).

Therefore, interstate commerce is not immune from state taxation. Moreover, under appropriate circumstances, a state may even directly tax the privilege of conducting interstate business. *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies,* 98 S. Ct. 1388, 1396 (1978).

Today, we live with the following test with respect to state taxes:

> [T]he tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce and is fairly related to the services provided by the State. *Complete Auto Transit, Inc. v. Brady,* 97 S. Ct. at 1079.

Accord, Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, 98 S. Ct. at 1389; *Colonial Pipeline Co. v. Traigle,* 421 U.S. at 108, 95 S. Ct. at 1543; *General Motors Corp. v. Washington,* 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964); *Northwestern States Portland Cement Co. v. State of Minnesota,* 357 U.S. at 357-63, 79 S. Ct. at 362-65.

Under this test, a state tax may not discriminate against interstate commerce. Discrimination, in the context of the commerce clause generally covers two separate, although closely related situations. First, discrimination against interstate

commerce occurs when a state tax provides a direct commercial advantage to intrastate businesses over interstate businesses. *Boston Stock Exchange v. State Tax Commission,* 97 S. Ct. at 607; *Northwestern States Portland Cement Co. v. State of Minnesota,* 358 U.S. at 458, 79 S. Ct. at 362; *see Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 70, 83 S. Ct. 1201, 1204, 10 L. Ed. 2d 22 (1963) (state tax will discriminate against interstate commerce unless equal treatment is provided for in-state as well as out-of-state taxpayers who are similarly situated). A state tax which causes this effect is prohibited because

> [p]ermitting the individual States to enact laws that benefit local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects. *Boston Stock Exchange v. State Tax Commission,* 97 S. Ct. at 607, *quoting Dean Milk Co. v. Madison,* 340 U.S. 349, 356, 71 S. Ct. 295, 299, 95 L. Ed. 329 (1951).

Second, a state tax will also discriminate against interstate commerce if that tax restrains or encourages people to trade only within the taxing state.

> A State may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce. As we stated at the outset, the fundamental purpose of the Clause is to assure that there be free trade among the several States. This free trade purpose is not confined to the freedom to trade with only one State; it is a freedom to trade with any State, to engage in commerce across all States' boundaries. *Boston Stock Exchange v. State Tax Commission,* 97 S. Ct. 609.

Both of these aspects of discrimination often comprise the opposite sides of the same coin. A state tax which

provides a commercial advantage to local commerce over interstate commerce would, simultaneously, encourage people to trade only within the taxing state. Thus, in finding that a state's particular tax measure discriminated against interstate commerce, the Court has normally found both of these effects to be present. *Boston Stock Exchange v. State Tax Commission,* 97 S. Ct. at 607-10;[15] *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. at 72, 83 S. Ct. at 1205.[16]

In determining whether a state tax discriminates against interstate commerce, the Court has repeatedly emphasized that it will look at the practical operation or effect of the state tax and not to its formal language. *Complete Auto Transit, Inc. v. Brady,* 97 S. Ct. at 1079 (Court's decisions have considered practical effect of state tax, not formal language of tax); *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. at 69, 83 S. Ct. at 1204 (proper analysis must take "the whole scheme of taxation into account," quoting *Galveston, H. & S. A. R. Co. v. Texas,* 210 U.S. 217, 227, 28 S. Ct. 638, 640, 52 L. Ed. 1031 (1908)); *Nelson v. Sears, Roebuck & Co.,* 312 U.S. 359, 363, 61 S. Ct. 586, 588, 85 L. Ed. 888 (1941) (in determining the constitutionality of a tax law, the court is concerned only with the statute's practical operation and not with its

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[15] In this case, the Court invalidated a New York statute which encouraged people to trade on the New York Stock Exchange and discouraged them from trading on stock exchanges located in other states.

[16] In *Halliburton Oil Well Cementing Co.,* the state of Louisiana imposed a use tax on manufacturers of equipment who brought equipment assembled by them in another state into Louisiana for their own use there. However, in-state manufacturers of equipment who used the equipment manufactured by them within Louisiana were not subject to the use tax. The court found that application of the Louisiana use tax in this situation discriminated against interstate commerce.

definition or the precise form of descriptive words which may be applied to it).

We are thus left with three propositions: First, interstate commerce must pay its own way. Second, a state tax must not provide a commercial advantage to intrastate commerce over interstate commerce or encourage people to trade only within the taxing state. Third, in determining whether a state tax presents one of these situations and discriminates against interstate commerce, the whole scheme of the state's tax must be considered.

A. *The New Mexico Tax Does Not Discriminate Against Interstate Commerce.*

Utilities generating electricity for consumption within New Mexico are subject to the same generating tax as utilities generating electricity for sale elsewhere. In analyzing appellants' contention that the New Mexico tax discriminates against interstate commerce, we present three hypotheticals.

In the first hypothetical, suppose New Mexico imposed a tax on the generation of electricity equal to 2%, and did not impose a sales tax on the retail sale of electricity. In this situation, the generation tax would apply equally to all generators of electricity at a 2% rate, and under *Utah Power & Light v. Pfost,* 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932), the tax would clearly be constitutional. The fact that New Mexico failed to impose a retail sales tax on electricity would not make the generation tax discriminatory.

In the second hypothetical, assume that New Mexico imposed a 2% tax on the generation of electricity *and* a 2% sales tax on all retail sales of electricity. In this situation, as in the first hypothetical, the generation tax would be

constitutionally valid because it would apply to all generators of electricity. Consumers in New Mexico would have a total tax burden on the generation and transmission of electricity equal to 4% (the 2% generating tax plus the 2% sales tax on retail sales of electricity).

Finally, in the third "hypothetical," suppose New Mexico enacted a 2% tax on the generation of electricity and a 4% sales tax on its retail sale. However, assume further that New Mexico allowed a credit against the sales tax equal to the 2% tax paid on the generation of electricity. New Mexico did this so that New Mexico consumers would have only a total tax burden on electricity equal to 4%, and not one greater than 4%.

As can be seen, the third "hypothetical" describes the actual operation of the New Mexico Electrical Energy Tax. In its actual effect it is no different from the tax in the second hypothetical which is obviously constitutionally valid.

These three hypotheticals clearly demonstrate that by looking at the net functional effect of the New Mexico tax, that tax does not discriminate against interstate commerce. The credit/reimbursement provisions of the tax only reduce the retail sales tax on electricity which must be paid by consumers in New Mexico. These provisions do not, as contended by appellants, eliminate the generation tax on electricity consumed in New Mexico. Appellants, through their characterization of the tax, have elevated form over substance.

As we have noted in the statement of the case, New Mexico wished to tax the generation of electricity without increasing the local tax on electricity sold in New Mexico. Therefore, in practical effect, New Mexico reduced the sales tax on electricity from 4% to 2%, thus, leaving the total tax

on electricity at the same 4% level which had existed before (2% attributable to the generation tax and 2% attributable to the retail sales tax). Mechanistically, New Mexico achieved this result by giving the New Mexico wholesale generators a credit against the retail sales tax equal to the generation tax paid. Since the wholesale generators were unable to use this credit, New Mexico permitted them to pass the credit along to the retail sellers of electricity. The retail sellers would then reimburse the generators of the electricity for the credit they received. The thrust of the appellants' argument is that when electricity is generated in New Mexico and marketed by a generator at a wholesale level for consumption in New Mexico, the wholesaler receives a credit while the wholesaler of electricity to be consumed elsewhere does not. While this is true, it is purely a matter of form; the credit system is simply the device for reducing the retail sales tax on electricity. *All* generators of electricity are required to pay the generation tax.

This Court, in evaluating state taxes challenged under the commerce clause, has pierced the form of a state tax in order to analyze the practical effects of that tax. In *State of Alaska v. Arctic Maid,* 366 U.S. 199, 81 S. Ct. 929, 6 L. Ed. 2d 227 (1961), Alaska imposed a license tax on the business of operating "freezer ships" in Alaska's commercial fisheries. The frozen fish went to Washington where they were canned. No tax was imposed on fish caught and frozen in Alaska and destined for canning in Alaska. Fish canned in Alaska, however, were not usually frozen and, instead, Alaskan canners paid a 6% tax on the value of fish obtained for canning. In upholding the tax on freezer ships, the Court, looking at the aggregate taxes paid in Alaska, found that they were substantially higher than those on freezer ships. The Court held there was no discrimination:

> For no matter how the tax on 'freezer ships' is computed, it did not exceed the six-percent tax on the local canners. Hence cases such as Commonwealth of Pennsylvania v. State of West Virginia, 252 U.S. 553, 595-596, 43 S. Ct. 658, 664-665, 67 L. Ed. 1117, which hold invalid state laws that prefer local sales over interstate sales, are inapposite. If there is a difference between the taxes imposed on these freezer ships and the taxes imposed on their competitors, they are not so 'palpably disproportionate' (*International Harvester Co. v. Evatt,* 329 U.S. 416, 422, 67 S. Ct. 444, 447, 91 L. Ed. 390) as to run afoul of the Commerce Clause. No 'iron rule of equality' between taxes laid by a State on different types of business is necessary. *Id.* at 204-05, 81 S. Ct. at 932.

As in *Alaska v. Arctic Maid,* the aggregate taxes imposed by New Mexico on the generation and transmission of electricity in New Mexico is substantially greater than the taxes imposed by New Mexico on the generation and transmission of electricity in interstate commerce. Thus, there is no discrimination.

See also South Carolina Power Co. v. South Carolina Tax Commission, 52 F.2d 515 (E.D. S.C.), *aff'd*, 286 U.S. 525, 52 S. Ct. 494, 76 L. Ed. 1268 (1931), in which South Carolina, like New Mexico, had a tax on the generation of electricity and a retail sales tax on electrical sales, and gave a credit against the sales tax for the amount paid under the manufacturing tax. A utility which imported electricity into South Carolina for sale and was, therefore, not subject to the South Carolina manufacturing tax and, hence, could not claim the South Carolina credit, contended that the tax discriminated against interstate commerce. The court, recognizing that a state could control its taxes and could credit one tax against another, said

> The evident purpose of the act is to impose a tax upon the current used within the state and to impose it at the

source or as soon as the current becomes subject to the jurisdiction of the taxing power, but not to impose it but once. If current produced as well as sold within the state were subjected to the sales tax, such current would rest under a double burden of taxation. To avoid this and at the same time to preserve the system of taxing at the source, current which is produced within the state is taxed at the time of generation but is relieved of the sales tax, which is equal in amount, with the result that all current sold within the state, whether produced there or brought in from another state, pays exactly the same tax. 52 F.2d at 521.

Reasoning similar to that used by this Court in *Alaska v. Arctic Maid* and by the court in *South Carolina Power Co.* was used by the Washington Supreme Court in *Public Utility District No. 2 of Grant County v. State,* 82 Wash. 2d 232, 510 P.2d 206, *appeal dismissed for want of a substantial federal question,* 414 U.S. 1106, 94 S. Ct. 833, 38 L. Ed. 2d 734 (1973). This case was expressly relied on by both the District Court and the Supreme Court of New Mexico. In this case, two Washington public utility districts which generated electricity for wholesale sold their electricity to Washington and Oregon utilities for resale to their customers. Washington imposed a tax on the light and power business measured by gross income. A deduction from gross income was allowed for amounts received from the sale of electricity to other public utilities if the electricity would be resold within Washington. The public utility districts contended that the tax discriminated against interstate commerce because the amounts they received on the sale of electricity to the Oregon utilities were included within gross income while the amounts they received from the sale of electricity to the Washington utilities were excluded from gross income.[17]

[17]The Washington tax system on electricity described by the Court in its opinion essentially parallels the New Mexico tax system. Under both systems, a credit or deduction is allowed against another tax. The only difference between these two systems is that in Washington the deduction actually lessened the tax paid by the utilities which made wholesale sales of electricity destined for resale within Washington. Under the New Mexico tax, the credit/reimbursement provisions do not lessen the generating tax which must be paid by utilities generating electricity for intrastate consumption. This credit only operates to reduce the retail sales tax on electricity which must be paid by the consumer.

The Washington Supreme Court upheld the tax and stated:

> [R]ather than having an interrelated tax structure (manufacturing-wholesaling) imposed, this case has a shifting tax structure in which singular tax liability exists but shifts to another utility. By so doing, the in-state distribution of the use of power is *not* exempted and is taxed, just as is the out-of-state distribution of power. Equal treatment is the theme of this system. The out-of-state utility is in no worse position than its in-state competitor. The state is playing no favorite with its resident business at the expense of similarly situated out-of-state enterprises. 510 P.2d at 211. (Citation omitted, emphasis in original.)

As in *Public Utility District No. 2 of Grant County v. State,* 82 Wash. 2d 232, 510 P.2d 206, *appeal dismissed for want of substantial federal question,* 414 U.S. 1106, 94 U.S. 833, 38 L. Ed. 2d 734 (1973), the generation of electricity consumed within New Mexico is subject to the generation tax. Utilities generating electricity for transmission within New Mexico must pay the generation tax just the same as utilities generating electricity for transmission elsewhere.

This Court's decision on this issue must rest on the practical and functional effect of New Mexico's total tax structure on electricity. Applying this standard, no serious criticism can be made of the New Mexico tax. The credit/reimbursement provisions of the tax do not exempt generators producing electricity for consumption within New Mexico from

paying the electrical energy tax. The State's tax structure is designed to tax the generation of electricity, but to do so only once.

B. *Utilities Which Operate in New Mexico and Generate and Transmit Electricity in Interstate Commerce Must Pay Their Own Way.*

We have earlier cited the statements of this Court that interstate commerce must pay its own way and we now refine and apply that concept here. As the Court stated in *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964), a case involving the constitutionality of a privilege tax measured by gross receipts:

> [T]he validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes, the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protection which the State has afforded. Where, as in the instant case, the taxing State is not the domiciliary State, we look to the taxpayer's business activities within the State, i.e., the local incidents, to determine if the gross receipts from sales therein may be fairly related to those activities. *Id.* at 440-41, 84 S. Ct. at 1568.

See also *Northwestern States Portland Cement Co. v. State of Minnesota*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959), and *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 98 S. Ct. 1388 (1978) containing this Court's most recent expression of authority to tax interstate activities with "an obvious nexus" in the taxing state.

We have, in our statement of the case, recited in a neutral

tone the consequences to New Mexico caused by the appellants' production of electricity within its borders. In argument, we may be less passive. The plain truth is that we are dealing with an environmental tragedy. The appellants, serving the population centers to the east and west of New Mexico, have found they can generate electricity in New Mexico for far less than what they would have to pay to generate it elsewhere. All of this serves quite nicely the states to which the electricity generated by the appellants is transmitted for their clean air is not fouled. The generation of electricity in the Four Corners area of New Mexico has polluted an area which had once been one of America's most scenic and remote areas. This Court need not evaluate the enormous problems caused by the social trade-off involved in balancing the pollution caused by the production of electricity against consumer needs to conclude that New Mexico has a very real interest in the production of electricity within its borders. New Mexico's "nexus" is both aesthetic and financial. As the appellants go marching out of New Mexico with millions of dollars worth of electricity, they cannot disclaim their responsibilities to the people of that state.

C. *The New Mexico Generation Tax and Other State Taxes.*

No serious argument can be made that a tax on the generation of electricity is invalid merely because the power eventually moves in interstate commerce. *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932). Appellants contend, therefore, that the New Mexico tax creates an improper prospect of multi-state taxation.

Whatever multiplication there may be, by definition, there can only be one tax placed on the generation of electricity

because there can only be one state of generation. Thus, the appellants' argument is that because electricity may be taxed by other states, electricity generated in New Mexico and transmitted to these states may be subject to multiple tax burdens. Whereas there may be a four percent tax ceiling on electricity in New Mexico the effect of these other states' taxes may be to subject electricity generated in New Mexico and transmitted into these states to a higher tax burden than on electricity consumed in New Mexico. But, it is not enough to invalidate a state tax because "an incidental or consequential fact of the tax is an increase in the cost of doing the business. . . ." *McGoldrick v. Bernwind-White Coal Mining Co.*, 309 U.S. 33, 46, 60 S. Ct. 388, 392, 84 L. Ed. 565 (1940). *See also Public Utility District No. 2 of Grant County v. State*, 82 Wash. 2d 232, 510 P.2d 206, 209, *appeal dismissed for want of substantial federal question*, 414 U.S. 1106, 94 S. Ct. 833, 38 L. Ed. 2d 734 (1973) (state tax does not burden interstate commerce merely because it may be passed on to out-of-state consumers).

Finally, appellants contend that the New Mexico tax is similar to the tax invalidated by this Court in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583 (1954). However, the tax invalidated in that case was found to be on the actual transmission of natural gas in interstate commerce. Additionally, the Court distinguished *Utah Power & Light Co. v. Pfost*, stating that *Pfost* involved a tax on the generation of electricity produced in one state and transmitted to another. 347 U.S. at 168, 74 S. Ct. at 402. As recognized in both *Pfost* and *Michigan-Wisconsin Pipe Line Co.*, such a tax is constitutional. The New Mexico generation tax does not extend beyond the generation of electricity and the credit/reimbursement provisions

only operate to reduce the amount of sales tax which must be paid by consumers in New Mexico.[18]

IV. *The New Mexico Tax Does Not Violate the Due Process Clause or the Import-Export Clause.*

We combine the minor arguments.

A. *The Due Process Clause.*

Appellants contend the due process clause of the fourteenth amendment imposes a geographic limitation upon the permissible exercise of a state's taxing power. With this we do not disagree. See *Moorman Manufacturing Co. v. Bair*, 98 S. Ct. 2340 (1978). However, appellants further assert that the New Mexico tax only applies to consumers in other states and, therefore, represents an attempt by New Mexico to project its taxing power beyond its own borders. This argument goes far wide of the mark.

The New Mexico tax is a tax on the generation of electric power in New Mexico; it is neither more nor less. The taxable occurrence for all electricity generated in New Mexico is at the time the electricity is generated. In fact, until the voltage of the generated electricity is later transformed in preparation for transmission, the particular market in which it will be distributed cannot be identified (App. 35, 42, 54, 60, 67). Thus, application of the generation tax is not dependent upon where the electricity is ultimately transmitted. Rather, the tax is applied only upon the actual generation of electricity within New Mexico.

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[18] In *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, supra*, the Court reaffirmed that the tax in *Michigan-Wisconsin Pipe Line Co.* was invalid because it amounted to an unapportioned tax on the interstate transportation of natural gas. *Id.* at 1399, n.18.

It is perfectly true that the tax was constructed, in relation to the New Mexico retail sales tax, in such a way as to not increase the total tax burden on electricity paid by New Mexico consumers to more than 4%. Adjusting the tax burdens which must be assumed by its residents is classical state business. Whatever vices a state tax may have, if any, it is elementary that each state may tax its residents and that each state may raise or lower particular taxes. The power to tax is an incident of state sovereignty. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 438, 97 S. Ct. 599, 606 (1977) (commerce clause has not eclipsed the reserved power of the states to tax to support their own governments).

B. *The Import-Export Clause.*

Since a portion of the power generated by one of the appellants in New Mexico is transmitted to the Republic of Mexico, the appellants contend that the New Mexico tax violates the import-export clause. It might be fairly arguable that if electricity in transmission to the Republic of Mexico were taxed, such a tax would be invalid under recent authorities refining the meaning of the import-export clause. See *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 98 S. Ct. 1388 (1978); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976). A state tax applicable to goods in transit will be invalidated under these authorities if the tax constitutes an impost or duty within the meaning of the import-export clause. We need not discuss whether the New Mexico generation tax is an impost or a duty, however, because that tax is only on the generation of electricity and is imposed at the time the electricity is generated in New Mexico. It is not a tax on electricity in transit

to the Republic of Mexico.

Appellants' argument that the New Mexico tax imposes a discriminatory burden upon electricity transmitted to Mexico is singularly inapposite here because there is no showing that the Republic of Mexico to which the power is exported has any sales tax of its own. It may be possible to argue that when electricity is "exported" to Arizona or California, the generating tax in New Mexico combined with the sales taxes in these two states may result in a larger cost to consumers than in New Mexico where the aggregate tax on electricity is limited to 4%. When the electricity is transmitted to the Republic of Mexico, this is not true, and the total tax imposed by New Mexico on the generation of electricity transmitted in interstate or in foreign commerce is 2%. Electricity generated and transmitted within New Mexico is taxed at exactly that same rate. This can scarcely be called discrimination.

CONCLUSION

It is respectfully submitted that the decision of the Court below should be affirmed.

Respectfully submitted,

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APPENDIX A

Pertinent Provisions of the New Mexico Electrical Tax Act.

CHAPTER 263

AN ACT

RELATING TO TAXATION; IMPOSING A TAX ON THE GENERATION OF ELECTRICITY; AMENDING SECTIONS 45-2-28 and 72-13-24 NMSA 1953 (BEING LAWS 1939, CHAPTER 47, SECTION 28 AND LAWS 1965, CHAPTER 248, SECTION 12, AS AMENDED); ENACTING A NEW SECTION 72-16A-16.1. NMSA 1953. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

. . .

Section 3. Imposition of Tax—Rate—Denomination as electrical energy tax.—A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

B. The tax imposed by this section shall be referred to as the "electrical energy tax." [§ 72-34-3, NMSA 1953 (1975 P.S.)]

Section 4. Measurement and recording of kilowatt hours of electricity.—Persons subject to the imposition of the electrical energy tax shall maintain accurate measuring devices and records to measure and record the daily and cumulative monthly and yearly totals of kilowatt hours of electricity generated or distributed in this state. [§ 72-34-4, NMSA 1953 (1975 P.S.)]

Section 5. Reports—Remittances.—Every person subject to the imposition of the electrical energy tax shall file a return on forms provided by and with the information required by the bureau and shall pay the tax due on or before the twenty-fifth day of the second month following the month in which the taxable event occurs. [§ 72-34-5, NMSA 1953 (1975 P.S.)]

. . .

Section 9. A new Section 72-16A-16.1 NMSA 1953 is enacted to read:

"72-16A-16.1. Credit—Gross receipts tax.—A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivision thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit."

APPENDIX B

Provisions of the United States Constitution Involved in this Appeal.

1. Article I, § 8, cl. 3:

"[Congress shall have power] To regulate Commerce with foreign Nations, and among the several States . . . ."

2. Article I, § 10, cl. 2:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws . . . ."

3. Amendment XIV, § 1:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY, *Appellants,*

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO, *Appellees.*

On Appeal From The Supreme Court of New Mexico

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REPLY BRIEF FOR APPELLANTS

ARGUMENT

I

The Electrical Energy Tax Cannot Escape The Reach Of The Tax Reform Act.

Both sides to this controversy acknowledge that the fate of New Mexico's Electrical Energy Tax Act, Laws of 1975, Ch. 263 (hereinafter "the Energy Tax" or "the Act") is governed, at least initially, by § 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (hereinafter "§ 391"), enacted by Congress during the pendency of this litigation. That statute provides, in perti-

nent part, that no state may impose "a tax on or with respect to the generation or transmission of electricity . . . if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

Appellants have previously shown that this statute, by its plain terms, invalidates any single state tax which is in fact discriminatory as the statute defines that term, and clearly encompasses the Energy Tax. (Brief for Appellants, pp. 19-21.) As anticipated, the State contends that § 391 "adds nothing to the constitutional test," and does not reach the Act. (Brief for Appellees, p. 11.) The fate of the Energy Tax, even under New Mexico's view of the "constitutional test," is discussed below. With respect to the statutory question presented, the State reaches its nullifying conclusion by failing to confront the express language of § 391 and by ignoring its actual legislative history in favor of a more palatable, but essentially fanciful, version.

The talisman "Congress does not pass legislative history, it passes laws" (Brief for Appellees, p. 21) is no sooner invoked than it is abandoned. Rather than focus on the law which Congress did pass, the State proceeds to argue that it is essentially meaningless and supports this argument with reference to excerpts from the legislative history of a bill which was never enacted—Senate Bill 1957. The apparent theory is that opposition to Senate Bill 1957 led to significant dilutions in the language of § 391. This contrived analysis is justified by a need to "read between the lines" (Brief for Appellees, p. 16), a novel approach to legislative history for which the State advances no precedent. More importantly, closer attention to the facts of record reveals that the State's suppositions are both inaccurate and unfounded.

In June 1975, Senator Fannin introduced a measure, as Senate Bill 1957, that prohibited state taxation "with respect to the generation of electricity within such State, to the extent that such electricity is transmitted to and consumed outside of such State." S. 1957, 94th Cong., 1st Sess. § 2 (1975). A brief hearing with respect to the measure was held on March 8, 1976, at which representatives from the States of Washington and West Virginia expressed some concern over its apparent breadth. *Hearing on S. 1957 Before the Subcommittee on Energy of the Senate Committee on Finance,* 94th Cong., 2d Sess. (1976) (hereinafter "Hearing"). This bill was apparently never considered by the Senate Finance Committee, and was never enacted.[1]

Certain observations should be made at this juncture. Initially, the history and fate of S. 1957 are of dubious significance in ascertaining Congressional intent with respect to § 391. This is particularly true when reliance is placed on the statements of those whom New Mexico describes as opponents of S. 1957:

> [W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill they understandably tend to overstate its reach. . . . It is the sponsors that we look to when the meaning of the statutory words is in doubt.

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[1] Any implication that S. 1957 was considered and rejected by the Finance Committee (see Brief for Appellees, p. 16) is wholly unwarranted.

Woodwork Manufacturers Asso. v. *NLRB,* 386 U.S. 612, 639-40 (1967) (quoting *Labor Board* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 66 (1964), and *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 394-95 (1951)). *Accord, S & E Contractors* v. *United States,* 406 U.S. 1, 13 n. 9 (1972).

Those considerations aside, the State has itself mischaracterized the objections to S. 1957. The concern expressed by Washington and West Virginia was that S. 1957 was "an overreaction to deal with the specific situation existing between New Mexico and Arizona," *Hearing,* p. 77, and would forbid all taxation of electric generation and grant all power companies immunity from state taxation, whether discriminatory or not. *Id.,* pp. 69, 77, 78, 80, 81. Representatives from both states expressed agreement with the objective of proscribing state taxes which imposed discriminatory burdens on electricity transmitted in interstate commerce for out-of-state consumption. *Id.,* pp. 71, 72, 80. The concern was that the language of S. 1957 went beyond that goal.

The State's argument assumes that Congress had only two options—either to grant total immunity from state taxation to all generation of electricity or to pass "sterile legislation." (Brief for Appellees, p. 11.) The assumption is unwarranted. Congress wanted to and did enact legislation which was specifically directed to discriminatory taxation of the generation and transmission of electricity. As previously explained, a provision to achieve that purpose was added by the Senate Finance Committee to the version of the Tax Reform Act passed by the House of Representatives (H.R. 10612).[2] That is the provision which was to become

[2] The State attempts to rely upon a letter from counsel for one of the appellants (in the State's view, a "lobbyist") to support certain gratuitious assertions concerning the derivation of § 391. (Brief for Appellees, pp. 18-20.) If nothing else, the correspondence in question confirms that § 391 has always been intended to reach the Energy Tax. The State overlooks the fact that the letter in question antedates passage of the bill by the Senate and has no bearing whatsoever on the actions of the Conference Committee. More significantly, simple logic indicates that the process of statutory construction, which has as its purpose ascertaining the intent of the legislative body, should only take into account materials considered by the legislative body as a whole. Materials so far removed from the mainstream of the legislative process are irrelevant to a determination of Congressional intent.

§ 391 and it is on the legislative history of this provision that attention should be focused.

The State cannot and does not dispute the tenor of that legislative history. The Report of the Senate Finance Committee on the Tax Reform Act clearly describes the Energy Tax as an example of the type of discriminatory state taxation to be forbidden. S. Rep. No. 94-938-Part I, 94th Cong., 2d Sess. (1976) 437-38, *reprinted in* [1976] U.S. Code Cong. & Admin. News 3865-66 (App. 107-08). The debate and defeat of the "Domenici Amendment" makes that point even more explicitly. 122 Cong. Rec. S. 12712 *et seq.* (daily ed. July 28, 1976). This legislative history cannot simply be ignored:

> When aid to construction of the meaning of the words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."

United States v. *American Trucking Asso.,* 310 U.S. 534, 543-44 (1940). *Accord, Train* v. *Colorado Public Interest Research Group,* 426 U.S. 1, 10 (1976); *Cass* v. *United States,* 417 U.S. 72, 78-79 (1974).

When the differing versions of the Tax Reform Act passed by the House and Senate were referred to conference, the Conference Committee made a minor language substitution, changing the words "higher gross or net tax" in the Senate-passed version to "greater tax burden," the formulation eventually enacted. The State characterizes this, again without benefit of citation to the actual legislative record, as a further "dilution" to accommodate lingering concerns from West Virginia and Washington.[3] Even if New Mexico had some factual support for these assertions (and none has been provided), this approach to statutory interpretation has also been rejected:

> [A]s has been noted, the most important committee changes relied upon were made without explanation. The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers.

Trailmobile Company v. *Whirls,* 331 U.S. 40, 61 (1947). That is particularly the case where the Conference Committee Report states unequivocally that its version "follows the Senate amendment." H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. (1976) 503, *reprinted in* [1976] U.S. Code Cong. & Admin. News 4206, and the language itself evidences no departure or retreat from the Senate's intentions.

When the State's attention finally does turn to the language of § 391, it merely asserts that the statute restates the constitutional test which New Mexico contends requires the examination of its entire scheme of taxation. Assertion, however, is no substitute for analysis. Section 391 itself defines the focus of inquiry—"a [state] tax on or with respect to the generation or transmission of electricity." The Energy Tax is the only tax of that description which New Mexico imposes. The credit provisions of the Energy Tax do not expand the analysis mandated by the Federal statute. They are part and parcel of the Energy Tax—without them, the Energy Tax would not have seen the light of day. Congress clearly dealt with this device by forbidding discriminatory burdens imposed "indirectly," such as by the credit provisions of the Energy Tax.

[3] The State also asserts that these concerns were frequently brought out "during the debate in Congress." (Brief for Appellees, p. 13.) The only debate of substance was concerned with the Domenici amendment, and the only concern expressed was that of Senators Domenici and Montoya for the fate of the Energy Tax, 122 Cong. Rec. S. 12712, *et seq.* (daily ed. June 28, 1976).

II

New Mexico Tacitly Concedes That The Energy Tax Discriminates Against Interstate Wholesale Transactions.

On the constitutional question, the bulk of New Mexico's argument is devoted to supporting the New Mexico Supreme Court's hypothesis that the question of discrimination against interstate commerce is to be resolved by examining "the *entire tax structure* of a state as applied to the *particular commodity* which is taxed. . . ." *Arizona Public Service Co.* v. *O'Chesky,* 91 N.M. 485, 576 P.2d 291, 294 (1978) (emphasis in original). Even assuming *arguendo* that that is the constitutional test, however, it cannot save the Energy Tax. Analysis of New Mexico's tax structure reveals clear discrimination against wholesale sales of electricity for consumption in other states.

New Mexico's recurrent mischaracterization of the taxes here involved requires some clarification. The Brief for Appellees contains repeated references to a "retail sales tax . . . paid by the consumer" which New

Mexico is claimed to have reduced. (*See, e.g.,* Brief for Appellees, pp. 5, 22, 29, 30, 37.) That is a fiction. New Mexico's Gross Receipts Tax, §§ 72-16A-1, *et seq.,* is imposed upon the retail vendor. The ultimate burden upon the consumer of the Gross Receipts Tax is not reduced one whit by the credit provisions of the Energy Tax. As is graphically shown below, these credit provisions benefit only generators and wholesalers of electricity for local consumption, by wholly expunging any Energy Tax liability. These assertions cannot divert attention from the unquestioned discrimination against interstate commerce that occurs at the wholesale level.

If a utility generating electricity in New Mexico sells that electricity at the wholesale level to an entity that transmits it to another state for consumption, the credit provisions of the Energy Tax are inapplicable and the tax must be paid. If, on the other hand, that electricity is wholesaled to a distributor or retailer who markets it for consumption in New Mexico, the provisions of §§ 9(B) and 9(C) of the Act insure that no tax burden will be incurred. In short, even taking New Mexico's entire taxing scheme into account, a wholesale sale of electricity for local consumption is subject to no tax burden whatsoever, while a similar sale of electricity for consumption in other states is subject to the Energy Tax.

New Mexico concedes that this is the case, but responds that this explicit discrimination "is purely a matter of form." (Brief for Appellees, p. 30.) This cavalier statement cannot survive an analysis of New Mexico's actual tax treatment of a hypothetical 100,000,000 KWH generated by an interstate utility, such as APS, as compared with its treatment of the same amount of power generated by a local utility such

as Public Service Company of New Mexico ("PNM"). Section 3 of the Act would impose upon both sets of 100,000,000 KWH a generation tax of $40,000.[4] Let us assume further than the 100,000,000 KWH produced by APS is sold in a wholesale transaction for eventual consumption in California or Arizona, while PNM's is sold to a wholesale purchaser who will eventually market it for local consumption. PNM will assign to its wholesale purchaser its "potential credit" of $40,000, and receive back from that purchaser a reimbursement in that same amount. Its wholesale transaction is effectively tax-free. On the other hand, solely because its electricity will *not* be consumed in New Mexico, APS cannot use the credit provisions of §§ 9(B) and (C), and it will pay a generation tax of $40,000.

As this Court has noted, "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64, 70 (1963). As demonstrated, New Mexico imposes a "dollars and cents" Energy Tax burden on wholesale sales of electricity in interstate commerce and none whatsoever on similar sales for local consumption. That is not a matter of form—that is impermissible discrimination, even under the standard the State advocates.

The other arguments advanced by the State, directed as they are to establishing a constitutional test which the Energy Tax cannot satisfy, do not require extensive treatment. The State again resorts to the fiction that the Energy Tax is only a reduction of its sales tax

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[4] This hypothetical figure represents approximately 10% of the 997,542,752 KWH generated by appellants in New Mexico in July 1975 alone. (App. 39, 45, 56, 62, 69.)

with respect to electricity, and describes hypothetical taxes which it could have enacted, which would achieve (it claims) the same result as the Energy Tax, and which (it contends) would pass constitutional muster.

The obvious premise of this argument is that, given a permissible end result, New Mexico may select whatever means it chooses, no matter how discriminatory or unconstitutional, to achieve it. That hardly commends itself as a principle of constitutional law. In any event, the invitation to debate the constitutionality of hypothetical alternative taxes, which New Mexico concededly did *not* enact, is beside the point:

> Whatever might be the fate of such a tax were it before us, the not too short answer is that Arkansas has chosen not to impose such a use tax, as its Supreme Court so emphatically found.

McLeod v. *J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944). *Accord, Travelers Ins. Co.* v. *Connecticut*, 185 U.S. 364, 371 (1902).

Equally unavailing is the State's reliance on § 9(A) of the Act as an "obvious effort to achieve equality." (Brief of Appellees, p. 6.)[5] Section 9(A) merely offers a credit against New Mexico's Gross Receipts Tax for any tax imposed by another state upon electricity generated there and transmitted to New Mexico for consumption. Its availability is pointedly limited to taxes imposed upon electricity consumed in New Mexico,

[5] The legislative history of the Energy Tax belies any effort on the part of the New Mexico legislature "to achieve equality." (See Brief for the Appellants, pp. 41-45.) It also demonstrates that the intent of the credit provisions was not to avoid "pyramiding of taxes" (Brief for Appellees, p. 6), but to collect revenue solely from interstate commerce.

and merely insulates local utilities from any sister state's retaliation against the Energy Tax. It does nothing to relieve the discriminatory burden New Mexico places on power generated in New Mexico and consumed elsewhere, and is constitutionally insufficient to save the Energy Tax. *Cf. Austin* v. *New Hampshire*, 420 U.S. 656, 666-67 (1975); *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 573-74 (1949).

III

New Mexico's Due Process Argument Is Wholly Irrelevant.

In an attempt to inject into this appeal an issue charged with some emotional overtones, and divert attention from the questions actually presented, the State reaches to discuss certain environmental damage and increased social service costs claimed to result from the generation of electricity within New Mexico. (Brief for Appellees, pp. 6-8, 34-35.) This is done by positing the possibility that "there may be an argument as to the legitimacy of New Mexico's interest in taxing the production of electricity within its borders." (*Id.*, p. 6.) This is simply a variation of the "straw man" technique—New Mexico, for whatever purpose, is attempting to defeat an argument which has not been made.

The "record" on this issue to which New Mexico alludes consists of various affidavits submitted in the trial court with the State's Motion for Summary Judgment. (App. 115-41.) Even under the most charitable analysis, these conclusory pleadings do not qualify as opinions, and they are certainly not "uncontroverted factual information" as the State claims. (Brief for Appellees, p. 9.) Given the procedural posture in which the issues were resolved by the trial court, there

was not opportunity to controvert these matters. Nor was there need to do so. The assertions contained in these affidavits were immaterial in the Santa Fe District Court and they are equally immaterial here.

The simple answer to the State's tactic is that the anticipated argument has not been made. Appellants do not question the principle that interstate commerce must pay its own way, and do not dispute that their activities in New Mexico create a sufficient jurisdictional *nexus* to support taxation by New Mexico. *See Colonial Pipe Line Co.* v. *Traigle,* 421 U.S. 100 (1975); *Gen'l Motors Corp.* v. *Washington,* 377 U.S. 436 (1964). Indeed, appellants have paid and continue to pay a variety of taxes in significant amounts to New Mexico and its political subdivisions. (App. 39, 45, 56, 63, 69, 78-83.)

Appellants do not complain of taxation by New Mexico—they complain of discriminatory taxation. The fact that interstate commerce must pay its own way cannot justify, and has never justified, the imposition of state taxes that burden interstate commerce but not similarly situated local enterprises.[6] That is the precise flaw of the Energy Tax, and it cannot be masked by the discussion of considerations pertinent only to an anticipated argument that has not been made.

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[6] New Mexico glosses over the fact that a local utility, Public Service Company of New Mexico, is an equal co-owner of the San Juan Generating Station, and an equity participant in Four Corners, which are apparently the two power plants to which the State refers. (App. 33, 66.)

CONCLUSION

For the reasons stated herein and in the Brief for Appellants, it is respectfully submitted that the lower court's opinion should be vacated, and New Mexico's Electrical Energy Tax Act declared unconstitutional.

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IN THE

Supreme Court of the United States

No. 77-1810 OCTOBER TERM, 1978

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,

Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO

Appellees.

On Appeal From The Supreme Court of New Mexico

BRIEF OF AMICI CURIAE

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INTEREST OF AMICI CURIAE

The State of New York, the State of New Jersey, the State of Maryland, the State of Ohio and the Commonwealth of Virginia are vitally interested in this proceeding because it tests the validity of a scheme of taxing electric energy that is similar in practical effect to the taxing schemes of Pennsylvania and West Virginia. Projections by the Pennsylvania Joint State Government Commission indicate that a tax which the Commonwealth

of Pennsylvania seeks to impose on exported power will raise $21,486,000 in the first year of its operation from electric utilities with service districts in New York, New Jersey, Maryland, Ohio and Virginia. It must be anticipated that this tax will, through rate adjustments, be passed on to and borne by residents of those states. Similarly, West Virginia imposes a tax which, if valid, will fall exclusively on electric energy generated in that state and consumed in other states, including Ohio, Maryland and Virginia. The Pennsylvania tax and the West Virginia tax are similar in effect (though not in form) to the New Mexico Electrical Energy Tax and are currently under challenge in the courts of Pennsylvania and West Virginia.[1] The decision of this Court on the validity of the New Mexico tax may be thought to be controlling with respect to the Pennsylvania and West Virginia taxes.

[1] The Pennsylvania tax is being challenged in a case brought in the Pennsylvania Commonwealth Court, styled *Baltimore Gas and Electric Co.* v. *Lopus,* No. 643 Commonwealth Docket, 1978, while the West Virginia tax is under challenge in a case brought in the Circuit Court of Kanawha County, West Virginia, styled *Duquesne Light Co.* v. *State Tax Dep't of West Virginia,* Civil Action No. CA-78-1786.

SUMMARY OF ARGUMENT

1. Under the test of discrimination set forth in Section 2121(a) of the Tax Reform Act of 1976, the New Mexico Electrical Energy Tax is fatally discriminatory since it necessarily results in a tax burden on out-of-state consumers of exported electric energy greater than the burden falling on domestic consumers of electric energy.

2. Taxes on exported electric energy tend to provoke retaliation by states in which that energy is consumed and, contrary to the principle of federalism and to our nation's energy policy, place artificial geographical restraints on the availability of coal as an energy source.

3. The effect of a tax on exported electric energy is to subject that energy to double taxation, in violation of the Commerce Clause of the United States Constitution. New Mexico's attempt to tax the generation of electric energy for export must yield to the plenary taxing power of the states where the energy is consumed.

4. The New Mexico scheme of taxing electric energy, which extends to all energy consumed in New Mexico, regardless of where generated, as well as to energy generated in New Mexico and exported to surrounding states for consumption there, discriminates against interstate commerce in contravention of Section 2121(a) of the Tax Reform Act of 1976 and the Commerce Clause of the United States Constitution.

5. A tax on the generation of electric energy the burden of which, as with New Mexico's tax, falls on out-of-state consumers of that energy, is extraterritorial in its practical operation and violates the Due Process Clause of the Constitution.

ARGUMENT

I. New Mexico's Electrical Energy Tax is Prohibited by Section 2121(a) of the Tax Reform Act of 1976.

New Mexico is not alone in seeking to tax electric energy generated within the state for sale to consumers in other states. On December 21, 1977, the Governor of Pennsylvania signed Act No. 1977-100, P.L. 340, PA. STAT. ANN. tit. 72, § 8101(b)(2) (Purdon Supp. 1978) (quoted in full in Appendix G to the Jurisdictional Statement as Section 1101(b) of the Pennsylvania Tax Reform Code of 1971), which extended Pennsylvania's existing public utility gross receipts tax to reach sales made outside of Pennsylvania of electric energy produced in Pennsylvania. The amending language effects this extension by providing that "every electric light company . . . shall pay . . . a tax of 45 mills upon each dollar of the gross receipts of the corporation . . . received from: . . . the sales of electric energy produced in Pennsylvania and made outside of Pennsylvania. . . ." PA. STAT. ANN. tit. 72, § 8101(b)(2) (Purdon Supp. 1978).[2] Re-enacting existing law (a gross receipts tax on intrastate sales), Section 8101(b)(1) provides that the 45 mill tax is also imposed upon "the gross receipts of the corporation . . . received from . . . the sales of electric energy within this state. . . ." PA. STAT. ANN. tit. 72, § 8101(b)(1) (Purdon Supp. 1978) (quoted in full in Appendix G to the Jurisdictional Statement).

The effect of the Act No. 1977-100 extension of the Pennsylvania public utility gross receipts tax to sales of electric energy outside the state is similar to the effect of New Mexico's Electrical Energy Tax. Electric energy generated within the state for export is taxed, whereas generation for local consumption is not. While the sale of electricity to consumers within the state continues to be subject to tax, this tax is imposed only at the retail level

[2] Section 8101(b)(2) goes on to prescribe a formula for determining the amount of taxable out-of-state sales based on the relationship between the taxpayer utility's Pennsylvania expenses to its total expenses.

and is not conditioned on the generation of electricity within the taxing state.

Effective April 1, 1978, the State of West Virginia substantially amended its taxes imposed on electric utilities. First, the rate of tax on retail sales of electric energy within the state was reduced from 5.72% on sales for domestic and commercial lighting purposes (4.29% on sales for all other purposes) to 4%.[3] W. VA. CODE § 11-13-2d (Supp. 1978). Second, the generation of electricity was eliminated from the broadly based manufacturers' privilege tax imposed at the rate of .88%. Third, a new tax was added which is imposed at the rate of 4% on every person engaged in the business of generating or producing electric power for sale "when the sale thereof is not subject to tax under section two-d of this article. . . ."[4] W. VA. CODE § 11-13-2m (Supp. 1978).

As a result of these statutory changes, electric energy exported from West Virginia has been singled out and made the subject of a generation tax, whereas electric energy consumed in West Virginia is subject to a consumption tax not predicated on generation of the energy within the state. Thus, the effect of West Virginia's generation tax is similar to that of the taxes on exported power imposed by New Mexico and Pennsylvania.

The only substantial issue before this Court concerning the applicability of Section 2121(a) of the Federal Tax Reform Act of 1976[5], 15 U.S.C. § 391, is whether the

[3] Under the amended tax, sales in West Virginia by electric utilities which do not generate within the state are taxed at 3%. Sales to manufacturers consuming extremely large amounts of electricity are taxed at 2.46%. W. VA. CODE § 11-13-2d (Supp. 1978).

[4] Under the statutory language, the 4% rate is to be applied "to the value of the electric power, as shown by the gross proceeds derived from the sale thereof . . . ." It is understood that, as administered, the tax is based on cost at the generation plant plus a rate of return.

[5] Section 2121(a) provides:

> No state, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

New Mexico Electrical Energy Tax is discriminatory within the meaning of that section.[6] The answer is clear. Not only the Electrical Energy Tax, but also Pennsylvania's Act No. 1977-100 and West Virginia's generation tax are discriminatory within the meaning of the section.

Discrimination under Section 2121(a) is not to be tested under existing Commerce Clause principles. In enacting Section 2121(a), Congress fashioned a new test to be met by any state seeking to tax electric energy generated within the state for transmission in interstate commerce. Accordingly, Congress set forth its own definition of "discriminatory" in the statute itself, there providing that:

> a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

Those to be protected from such discrimination are specified to be "out-of-state manufacturers, producers, wholesalers, retailers or consumers" of the exported electricity. A tax on exported electric energy inevitably increases the tax burden falling on consumers in other states. To the exporting utility's costs must be added New Mexico's, Pennsylvania's or West Virginia's tax, which cost is then passed on through rate adjustments to the exporting utility's out-of-state customers as an addition to the local tax burden already reflected in their rates. While the tax burden on out-of-state residents is thus increased, the tax

[6] Appellees' argument that, if applicable, Section 2121(a) is unconstitutional borders on the frivolous. In 1959, in response to this Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959), Congress enacted Pub. L. No. 86-272, 15 U.S.C. § 381, known as the Interstate Taxation of Income Act, which prohibits a state from levying a corporate net income tax on a corporation whose only activity within the state is the solicitation of orders (approved outside the state) for sales of tangible personal property. Pub. L. No. 86-272 was upheld by the Louisiana Supreme Court in *Int'l Shoe Co.* v. *Cocreham*, 246 La. 244, 164 S.2d 314 (1964) and certiorari was denied by this Court. 379 U.S. 902 (1964).

burden on in-state residents remains constant; they continue to bear the burden of only a single tax on consumption.

The discriminatory effect of a tax on exported electric energy can be seen most clearly in the case of the new tax imposed by Pennsylvania's Act No. 1977-100. That tax is imposed upon "each dollar of the gross receipts . . . received from . . . the sales of electricity produced in Pennsylvania and made outside of Pennsylvania. . . ." Accordingly, every out-of-state sale of electric energy generated in Pennsylvania and sold in, *inter alia,* New York, New Jersey, Maryland, Ohio or Virginia is taxed by Pennsylvania. At the same time, every such sale is also taxed by the state in which the sale is made.[7] On the other hand, electric energy sold in Pennsylvania is taxed only once, that is, by Pennsylvania. This proliferation of state taxes on exported power as distinct from power locally consumed is what Congress meant by "discriminatory" as used in section 2121(a).

While the New Mexico Electrical Energy Tax[8] is more subtly contrived than the Pennsylvania tax on exported power, its discriminatory effect is similar. On the face of the statute, the New Mexico Electrical Energy Tax is imposed evenhandedly on all persons generating electricity within New Mexico for sale. However, by reason of a credit allowed against a utility's New Mexico gross receipts tax liability,[9] only power exported from New Mexico is actually subjected to the Electrical Energy Tax. Unlike the Pennsylvania tax, the New Mexico Electrical Energy Tax is based on kilowatt hours generated within the state rather than on sales of electricity outside the state. However, the effect is similar. In both cases (as in the case of West Virginia), the tax burden on exported electric energy is increased at the expense of out-of-state consumers, with no increase in the tax burden borne by consumers within the taxing state. This Court should not permit itself to be misled by the credit device employed by New Mexico in an attempt to disguise the discriminatory feature of its Electrical Energy Tax.

[7] New York imposes a 3% tax on public utility gross receipts. N.Y. TAX LAW § 186-a (McKinney Supp. 1977); New Jersey, through a combination of taxes and surtaxes, subjects electric utilities to gross receipts taxes totaling 14.0625%. N.J. STAT. ANN. § 54:30A-54(a), (b) and (c) (West Supp. 1978); Maryland imposes a gross receipts tax on electric utilities at the rate of 2%. MD. ANN. CODE art. 81, § 130 (1975); Ohio's gross receipts tax on utilities is imposed at the rate of 4%. OHIO REV. CODE ANN. §§ 5727.38, 5727.81 (Page 1973); Virginia's gross receipts tax on electric utilities is imposed at 1¼% on gross receipts up to $100,000, and 3½% on gross receipts in excess of $100,000, reducing gradually to 2% by 1983. VA. CODE § 58-603 (Supp. 1977). Virginia localities impose a sales/use tax on the residential consumption of electricity. New taxes on residential consumption may not exceed $3.00 per consumer per month. VA. CODE § 58-617.2 (1974).

[8] N.M. STAT. ANN. §§ 72-34-1 to 72-34-6 (Sapp. 1975) (printed in full in Appendix D to the Jurisdictional Statement).

The language of Section 2121(a) is extremely broad: Discrimination results if a generation tax either "directly or indirectly" results in a "greater tax burden" on exported electric energy than on domestically consumed electric energy. Contrary to Appellees' assertion (Motion to Dismiss or Affirm at 10), there is no suggestion in this language that discrimination should be tested by looking only at the taxing state's scheme of taxing electricity. Had Congress wished to use this test, it would have done so. Instead it adopted a new, broader test which focuses on the disparity in tax burden between in-state and out-of-state consumers of electricity. During the Congressional debate on the Domenici amendment, which would have stricken Section 2121(a) from the Tax Reform Act of 1976, Senator Domenici of New Mexico stated:

> I submit that one might define discriminatory as one wishes. There is a disequal treatment in the final product here when we are all through. Groups of taxpayers are treated differently. I submit, Mr. President, that is not the kind of discrimination in terms of the imposition of a State tax structure by a State exercis-

[9] N.M. STAT. ANN. § 72-16A-16.1 (Supp. 1975) (printed in full in Appendix D to the Jurisdictional Statement).

> ing its sovereign right. The fact that citizens from without and within are treated differently should not be the basis of defining it as discriminatory and thus illegal as this particular provision of the reform act that we have before us is going to do.

122 Cong. Rec. S12713 (daily ed. July 28, 1976). Senator Domenici thus recognized that Section 2121 would impose a new test of discrimination but he failed in his attempt to have the section stricken from the bill. What Congress intended by the word "discriminatory" as used in Section 2121(a) was precisely the different treatment of "citizens from without and within" which, as Senator Domenici recognized, the New Mexico scheme brings about. This may indeed be a new test of discrimination. It is nonetheless a valid test in the realm of state taxes on exported electric energy.

This Court need not decide at this time whether a truly evenhanded generation tax such as that involved in *Utah Power & Light Co.* v. *Pfost,* 286 U.S. 165 (1932), is banned by Section 2121(a). Such a tax is measured by generation within the taxing state and only within the taxing state, regardless of where the energy is consumed, and necessarily is borne in part by the local electorate. Such a tax does not operate as a consumption tax, nor is it coupled with a consumption tax.

In contrast, the schemes for taxing electric energy now operative in New Mexico, Pennsylvania and West Virginia are not evenhanded. This is most clearly visible in the case of Pennsylvania. Through its ongoing gross receipts tax on in-state retail sales of electric energy, Pennsylvania imposes a consumption tax on all electric energy consumed in Pennsylvania, even that which has been generated in other states and imported into Pennsylvania.[10] Being a consumption tax, this tax is imposed only at the retail

[10] Amici understand that in 1977, more than 13.9 billion kilowatt hours of electric energy consumed in Pennsylvania were derived from out-of-state sources.

level. Wholesale sales of electric energy intended for ultimate consumption in Pennsylvania are tax free.

On this traditional matrix of taxing electric energy, Pennsylvania has now superimposed a tax on electric energy generated in Pennsylvania and sold elsewhere, either at wholesale or at retail. Quite apart from the obvious constitutional deficiencies, this overall scheme of taxing electric energy is inherently overreaching. Not only does Pennsylvania tax the entire field of electric energy consumed within the state regardless of where that energy is generated, but, not content with having exhausted the taxing of consumption, Pennsylvania seeks to reach out and tax energy generated within the state and consumed elsewhere. In so doing, Pennsylvania seeks to tax more than the whole electric energy pie—necessarily at the expense of consumers in surrounding states on whom the burden of the export tax must ultimately fall. If this scheme of taxation is not "discriminatory" within the meaning of Section 2121(a), then the enactment of that provision by Congress was an idle gesture.

The same vice is inherent in the New Mexico and West Virginia schemes for the taxation of electric energy, only (through the allowance of a credit against the gross receipts tax in the one case and an exclusion from the generation tax in the other) in disguised form. It is true that New Mexico, unlike West Virginia and Pennsylvania, purports to allow a credit against its gross receipts tax for any generation tax paid to another state. However, to assert that this credit saves the New Mexico Electrical Energy Tax from the charge of discrimination begs the question since taxes on the generation of electric energy for export are a rarity and their validity in the light of Section 2121(a) is what is at issue in this and other litigation.

One of the evils which Congress perceived and took steps to prevent in enacting Section 2121(a) of the Tax Reform Act of 1976 is clearly illustrated by reference to the reaction of bordering states to the enactment of the

Pennsylvania tax on exported electric energy. On February 3, 1978, Governor Carey of New York disapproved the renewal of a Pennsylvania-based electric cooperative's entitlement of power from the Niagara Power Project, giving as his reason the fact that the cost of electricity to New York consumers had been increased by Pennsylvania's new tax on exported power.[11] Also, on June 22, 1978, a bill[12] was introduced in the New Jersey General Assembly which would mirror Pennsylvania's Act No. 1977-100 by imposing a tax on electric energy generated in New Jersey and sold outside the state. The tax would remain in effect by its terms only so long as Act No. 1977-100 remains in effect. These retaliatory acts of New York and New Jersey bear out Senator Fannin's remarks on the floor of the Senate concerning the evils inherent in a tax on exported electric energy:

> We are talking about what could happen all over the United States. We are talking about a potential taxing war on the sale of power which could be devastating.

122 CONG. REC. S12713 (daily ed. July 28, 1976).

It is significant, in weighing the intent of Congress, that New Mexico's Electrical Energy Tax, Pennsylvania's Act No. 1977-100, and West Virginia's generation tax are directly contrary to the nation's energy policy as recently codified in the Powerplant and Industrial Fuel Use Act of 1978, Act of November 9, 1978, Pub. L. No. 95-620. [Nov. 9, 1978] DAILY TAX REPORT (BNA) (No. 218 at G-3)[13].

[11] See Brief of Amici Curiae in Support of Jurisdictional Statement at 2-3.

[12] Bill No. 1525, now in the Taxation Committee of the New Jersey General Assembly, printed as Appendix B to Brief of Amici Curiae in Support of Jurisdictional Statement.

[13] Signed by the President on November 9, 1978, Pub. L. No. 95-620, dealing with the conversion of electric utilities to coal as a source of fuel, is one portion of the Administration's five-part energy plan, the other portions of which are Pub. L. No. 95-617 providing for utility rate reform, Pub. L. No. 95-618 providing for certain tax incentives to energy conservation, Pub. L. No. 95-619 dealing generally with energy conservation and Pub. L. No. 95-621 involving natural gas pricing. [Nov. 9, 1978] DAILY TAX REPORT (BNA) (No. 218 at G-3).

Included in section 102(a) of the Act is the following finding:

> The protection of public health and welfare, the preservation of national security, and the regulation of interstate commerce require the establishment of a program for the expanded use, consistent with applicable environmental requirements, of coal and other alternate fuels as primary energy sources for existing and new electric powerplants and major fuel-burning installations; . . .

Pub. L. No. 95-620, § 102(a)(1) (*as printed in* Conf. Rep. No. 95-988, 95th Cong., 2d Sess. 3 (1978)). Expanding on the term "other alternate fuels," section 102(b) provides that one of the purposes of the Act is

> to encourage and foster the greater use of coal and other alternate fuels, in lieu of natural gas and petroleum, as a primary energy source.

Pub. L. No. 95-620 § 102(b)(3) (*as printed in* Conf. Rep. No. 95-988, 95th Cong., 2d Sess. 4 (1978)).

New Mexico, Pennsylvania and West Virginia have abundant coal resources, and, because of the economies involved in constructing power plants near the fuel source, this has been an important motivating factor in the siting of coal-fired generating facilities in these states.[14] Increasing use of these coal resources for the benefit of people in large areas of the country is in line with the national energy policy as just described. The taxes on exported electric energy, which New Mexico, Pennsylvania

[14] Senator Goldwater described the four corners area of New Mexico as a location where "there are vast deposits of very deep shale that can literally be bulldozed into the furnaces which in turn run the generating plant to create electricity." 122 CONG. REC. S12715-6 (daily ed. July 28, 1976). Many of the out-of-state utilities generating in Pennsylvania and West Virginia do so as joint owners of so-called mine mouth plants located directly adjacent to coal mines.

and West Virginia seek to impose, inhibit the realization of this objective. Obviously, the host states must have the power to tax these major coal facilities, but the tax burden must be felt by the local electorate, too— anything less has been proscribed by Congress in the interest of the nation as a whole. While it would be disingenuous to suggest that at their present rates these taxes will drive out-of-state utilities from the taxing states, it must be recognized that these taxes on exported energy operate *pro tanto* to discourage the entry of out-of-state utilities and the use of the coal resources of these three states for the benefit of the people of the entire region. Depending on future tax rates, today's discouragement may become tomorrow's prohibition.

II. New Mexico's Electrical Energy Tax Violates the Commerce Clause of the United States Constitution.

The effect of New Mexico's Electrical Energy Tax, like Pennsylvania's Act No. 1977-100 and West Virginia's generation tax, is to discriminate against interstate commerce in violation of the Commerce Clause of the Constitution of the United States. Such discrimination exists because these taxes are imposed only on electric energy moving in interstate commerce[15] and their imposition necessarily results in a cumulative tax burden on such commerce.

While multiple taxation is most blatant in the case of the Pennsylvania tax, it is equally present with the taxes of the other two states. The Pennsylvania tax, as extended by Act No. 1977-100, is on sales of electric energy outside of Pennsylvania. Since every other state in which Pennsylvania-generated electric power is sold has its own gross receipts tax on retail sales of electric energy

[15] Expressly, in the case of the Pennsylvania tax; in practical effect in the case of the New Mexico and West Virginia taxes.

within the state,[16] every sale of power generated in Pennsylvania and exported for consumption in another state is subject to a sales tax both by Pennsylvania and by the state in which the sale occurs.

By in effect exempting, through the credit device, electric energy consumed within the state and subjected to the New Mexico Gross Receipts Tax, the Electrical Energy Tax now imposed by that state necessarily falls only on energy exported out of the state. The record indicates that the destination states also impose taxes on electric energy,[17] with the result that energy exported from New Mexico is double taxed.

Similarly, the West Virginia generation tax, excluding as it does energy consumed within the state, falls only on energy exported out of West Virginia. All of the states bordering West Virginia impose gross receipts taxes or sales taxes on electric energy consumed within their borders, regardless of where generated.[18] Again, double taxation of exported energy results.

[16] New York: 3%, N.Y. TAX LAW § 186-a (McKinney Supp. 1977); New Jersey: 14.0625%, N.J. STAT. ANN. § 54:30A-54(a), (b) and (c) (West Supp. 1978); Maryland: 2%, MD. ANN. CODE art. 81, § 130 (1975); Ohio: 4%, OHIO REV. CODE ANN. §§ 5727.38, 5727.81 (Page 1973); Delaware: 5%, DEL. CODE tit. 30, § 5502 (1974); District of Columbia: 6%, D.C. CODE § 47-1701 (West Supp. 1978); Virginia: 1⅛% on gross receipts up to $100,000 and 3½% on gross receipts in excess of $100,000, reducing gradually to 2% by 1983, VA. CODE § 58-603 (Supp. 1977); Virginia localities impose a sales/use tax on the residential consumption of electricity. New taxes on residential consumption may not exceed $3 per consumer per month. VA. CODE § 58-617.2 (1974); W. Va.: 4%, W. VA. CODE § 11-13-2d (Supp. 1978).

[17] In 1975, the Appellants paid a total of $13,615,965 to state and local jurisdictions where electric energy generated in New Mexico and subjected to the Electrical Energy Tax was consumed. Appellants' Brief-in-Chief in the New Mexico Supreme Court at 25.

[18] States bordering West Virginia impose upon electric utilities the following gross receipts taxes on intrastate sales: Maryland: 2%, MD. ANN. CODE art. 81, § 130 (1975); Ohio: 4%, OHIO REV. CODE ANN. §§ 5727.38, 5727.81 (Page 1973); Pennsylvania: 4.5%, PA. STAT. ANN. tit. 72, § 8101(b)(1) (Purdon Supp. 1978); Virginia: 1⅛% on gross receipts up to $100,000 and 3½% on gross receipts in excess of $100,000, reducing gradually to 2% by 1983, VA. CODE § 58-603 (Supp. 1977). Virginia localities impose a sales/use tax on the residential consumption of electricity. New taxes on residential consumption may not exceed $3 per consumer per month. VA. CODE § 58-617.2 (1974). Kentucky imposes a 5% sales tax on the consumer of electricity measured by the sale price of the electricity, KY. REV. STAT. §§ 139.200, 139.210 (1971).

This Court has noted the unique risk of multiple taxation of interstate commerce presented by a gross receipts tax. *General Motors Corp.* v. *Washington,* 377 U.S. 436, 440 (1964); *United States Glue Co.* v. *Town of Oak Creek,* 247 U.S. 321, 328-29 (1918). In invalidating New Mexico's Gross Receipts Tax as it applied to the sale of instructional materials produced in New Mexico and sold outside the state, the Court stated: "a tax levied on the gross receipts from the sales of tangible personal property in another State is an impermissible burden on commerce." *Evco* v. *Jones,* 409 U.S. 91, 93 (1972). Using similar language, the Court struck down the Indiana Gross Income Tax as applied to sales of goods manufactured in Indiana but sold outside the state:

> The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.

J. D. Adams Manufacturing Co. v. *Storen,* 304 U.S. 307, 311 (1938). *See also Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434, 439 (1939).

This risk of multiple taxation is not limited to gross receipts taxes but has also been recognized by this Court to exist with taxes closely analogous to the New Mexico Electrical Energy Tax and the West Virginia generation tax. As pointed out by Appellants in their Jurisdictional Statement at 21, the Electrical Energy Tax is similar to the Texas tax on "gathering gas" involved in *Michigan-Wisconsin Pipeline Co.* v. *Calvert,* 347 U.S. 157 (1954). That tax was not measured by gross receipts from out-of-state sales but rather by the value of the gas at the point of transfer from the producer to the pipeline company at a point in-state. Noting that the state of distribution might impose a similar tax on the gas when it was "unloaded" from the interstate pipeline, this Court found the Texas tax offensive under the Commerce Clause and struck it down.

Accordingly, the fact that the New Mexico and West Virginia taxes on exported electric energy are generation taxes whereas the taxes imposed by the surrounding states are gross receipts taxes does not change the result under the Commerce Clause. With the overruling of *Spector Motor Service* v. *O'Connor,* 340 U.S. 602 (1951), in *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977), this Court swept away the last vestige of formalism in the field of state taxation of interstate commerce.[19] The validity of a state tax under the Commerce Clause must now be tested not by the name of the tax but rather by its practical economic effect. A generation tax on exported electric energy results in double taxation of that energy just as fully as does a gross receipts tax.

While not yet articulated as a rule of law, it is clear from this Court's decisions that where a threat of double taxation exists, it is the tax of the state where the commodity originates that must give way to a tax of the state of destination. Thus, in *Evco* v. *Jones,* 409 U.S. 91 (1972), New Mexico was prohibited from imposing its gross receipts tax on instructional materials sold outside the state. In *J. D. Adams Manufacturing Co.* v. *Storen,* 304 U.S. 307 (1938), Indiana was prohibited from imposing its gross receipts tax upon receipts from sales outside the state. A similar result was reached in *Michigan-*

[19] It should be noted that *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977), throws serious doubt on the continuing validity of *American Mfg. Co.* v. *City of St. Louis,* 250 U.S. 459 (1919).

Wisconsin Pipe Line Co. v. *Calvert,* 347 U.S. 157 (1954): The tax imposed by the state of origin was struck down.

On the other hand, recent decisions of this Court have given wide latitude to the taxing power of the state of destination. In both *General Motors Corp.* v. *Washington,* 377 U.S. 436 (1964), and *Standard Pressed Steel Co.* v. *Washington,* 419 U.S. 560 (1975), the Washington gross receipts tax was upheld as applied to the unapportioned gross receipts of out-of-state taxpayers making sales in the State of Washington.[20]

This trend, so clearly discernible in this Court's recent decisions, to favor taxes imposed by the destination state against those imposed by the state of origin, is demonstrably sound. The bill which was to become the New Mexico Electrical Energy Tax was sponsored in the New Mexico House by Representative Lopez, who in his opening remarks stated:

> I find myself in the unique position this year, Mr. Speaker, of having to support a measure of this nature. As you all know, for the last four years, I've stood up in opposition to the imposition of this sort of tax. But my opposition was based on the fact that there was no way to impose the tax without placing a burden on the New Mexico taxpayer or utility user. However, this year a device has been worked out whereby there is a credit in it and the tax will be paid by out-of-state residents with no additional burden on our New Mexico residents.

122 CONG. REC. S12714 (daily ed. July 28, 1976).

[20] The trend to allow the destination state to tax a commodity and to prohibit the state of origin from doing so has been noted by commentators. *See e.g.,* Walter Hellerstein, *State Taxation of Interstate Business and the Supreme Court, 1974 Term: Standard Pressed Steel and Colonial Pipe Line,* 62 VA. L. REV. 149, 171 (1976); Richard J. Krol, *Impact of Supreme Court's National Geographic case on use-tax collection responsibilities,* 47 J. OF TAX. 44 (July, 1977). *See also* Justice Rutledge's concurring opinion in *Internat'l Harvester Co.* v. *Dep't of Treasury,* 322 U.S. 340, 360-1 (1944) and his concurring opinion in *Freeman* v. *Hewit,* 329 U.S. 249, 278-80 (1946).

In the same vein, Representative Mebus of Pennsylvania, in debate on the bill which would become Pennsylvania Act No. 1977-100, stated on the floor of the Pennsylvania House of Representatives:

> Mr. Speaker, at first blush this bill appears to be an ideal tax bill for it affects no Pennsylvanians. It passed the Senate by a vote, I believe, of 48 to nothing. The taxes to be collected are to be paid by the utility companies of Ohio and New York, New Jersey, Delaware, Maryland, Virginia and West Virginia, or by their consumers by means of a pass-through.

Record of Pennsylvania House of Representatives, December 13, 1977, 3rd Consideration of S.B. 782.

The New Mexico tax raises approximately $5,000,000 annually from out-of-state utilities,[21] while Pennsylvania Act No. 1977-100, according to the Pennsylvania Joint State Government Commission, would raise at least $23,000,000 from out-of-state utilities in its first year of operation.[22] The politically inviting tactic of exporting taxes of this magnitude and imposing them solely on taxpayers who have no voice in the taxing state's legislative processes should be nipped in the bud.

The New Mexico Electrical Energy Tax, like Pennsylvania's Act No. 1977-100 and West Virginia's generation tax, also violates the Commerce Clause in that it discriminates against electric energy exported from the state in favor of energy consumed in the state. Energy consumed in New Mexico is taxed only at the consumption (retail) level, whereas exported energy is subjected to tax whether the exporting utility sells it at wholesale or retail.[23]

[21] 122 CONG. REC. S12716 (daily ed. July 28, 1976).

[22] Approximately $21,486,000 of that $23,000,000 would be paid by utilities having their service districts in New York, New Jersey, Maryland, Ohio and Virginia.

[23] While present with the New Mexico and West Virginia taxes, this vice is most clearly apparent in Pennsylvania's electric energy tax scheme; the Pennsylvania Legislature has blatantly coupled a sales tax on *all* out-of-state sales of energy generated in Pennsylvania with a sales tax on *retail* sales made within Pennsylvania.

In *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64 (1963), this Court struck down the Louisiana Use Tax on the ground that certain transactions involving the importation of goods into the state were taxed more heavily under the use tax than they would have been under the sales tax, or in certain cases were subject to the use tax and would not have been subjected to the sales tax. The Court stated:

> The conclusion is inescapable: Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state.

Id. at 70.

New Mexico, Pennsylvania and West Virginia seek to have the best of both worlds. Through their gross receipts taxes on local retail sales they tax fully on a destination basis, reaching electric energy generated in other states and imported into the taxing jurisdiction as well as electricity generated and consumed locally. In addition, they now seek to tax electric energy generated locally but destined for transmission in interstate commerce and consumption elsewhere. Such a scheme of taxation is, as pointed out in an earlier section of this brief, inherently overreaching. It is precluded not only by section 2121(a) of the Tax Reform Act of 1976, but by the Constitution through the Commerce Clause.

In upholding the New Mexico Electrical Energy Tax, the Supreme Court of that state attached significance to its finding that the tax was enacted to deal with the environmental and socio-economic problems caused by out-of-state utilities generating in New Mexico (Opinion of New Mexico Supreme Court, printed at 3b of the Jurisdictional Statement). One may sympathize with New Mexico's desire to protect its environment, but taxing out-of-state interests alone is not a constitutionally permissible method

of doing so. By reason of the credit feature in the New Mexico Gross Receipts Tax, only out-of-state utilities and their customers are forced to pay the Electrical Energy Tax and thus to bear the cost of preserving New Mexico's environment.

Analogous situations may be found in non-tax cases involving attempts by the states to protect their resources and environment from outsiders. Long before the increased use of coal was adopted as a national energy policy, this Court struck down an Oklahoma statute which attempted to retain natural gas within the state. The Court stated:

> Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sales by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we

have said that "in matters of foreign and interstate commerce there are no state lines."

West v. *Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911). *See also Pennsylvania* v. *West Virginia*, 262 U.S. 553, 595-600 (1923). New Mexico's Electrical Energy Tax is offensive for the same reason. Inevitably it discourages out-of-state utilities from locating their generating plants within New Mexico, thereby conserving New Mexico's coal resources to produce low cost electricity for New Mexico residents.

III. New Mexico's Electrical Energy Tax Is Invalid under the Due Process Clause of the United States Constitution.

It is well settled that the Due Process Clause of the United States Constitution prevents a state from taxing transactions occurring beyond its borders. Thus, in *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965), this Court invalidated the application of the Idaho Motor Fuels Tax to an oil company making sales outside Idaho. To similar effect is *Miller Brothers Co.* v. *Maryland*, 347 U.S. 340 (1954).

Pennsylvania's Act No. 1977-100, insofar as it attempts to tax sales of electric energy outside of Pennsylvania, is the clearest form of extraterritorial taxation banned by the Due Process Clause. While the extraterritorial effect of the New Mexico Electrical Energy Tax and the West Virginia generation tax is not so blatant, in economic reality all three of these taxes have the same effect. Each tax falls squarely on exported electric energy and the burden of the tax, like the energy itself, is exported and falls on out-of-state consumers.

CONCLUSION

Section 2121(a) and its constitutional underpinnings present this Court with the opportunity of discouraging the enactment of discriminatory taxing schemes on exported electric energy. While such discrimination clearly violates Section 2121(a) and the Constitution and should be struck down for that reason alone, the evil in the discrimination is particularly apparent in an era of increasing energy shortages. A broad invalidation of New Mexico's Electrical Energy Tax will further the nation's attempt to fairly and economically allocate scarce energy resources to the places where they are needed, without regard to state lines.

For the foregoing reasons, the judgment of the Supreme Court of New Mexico should be reversed.

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